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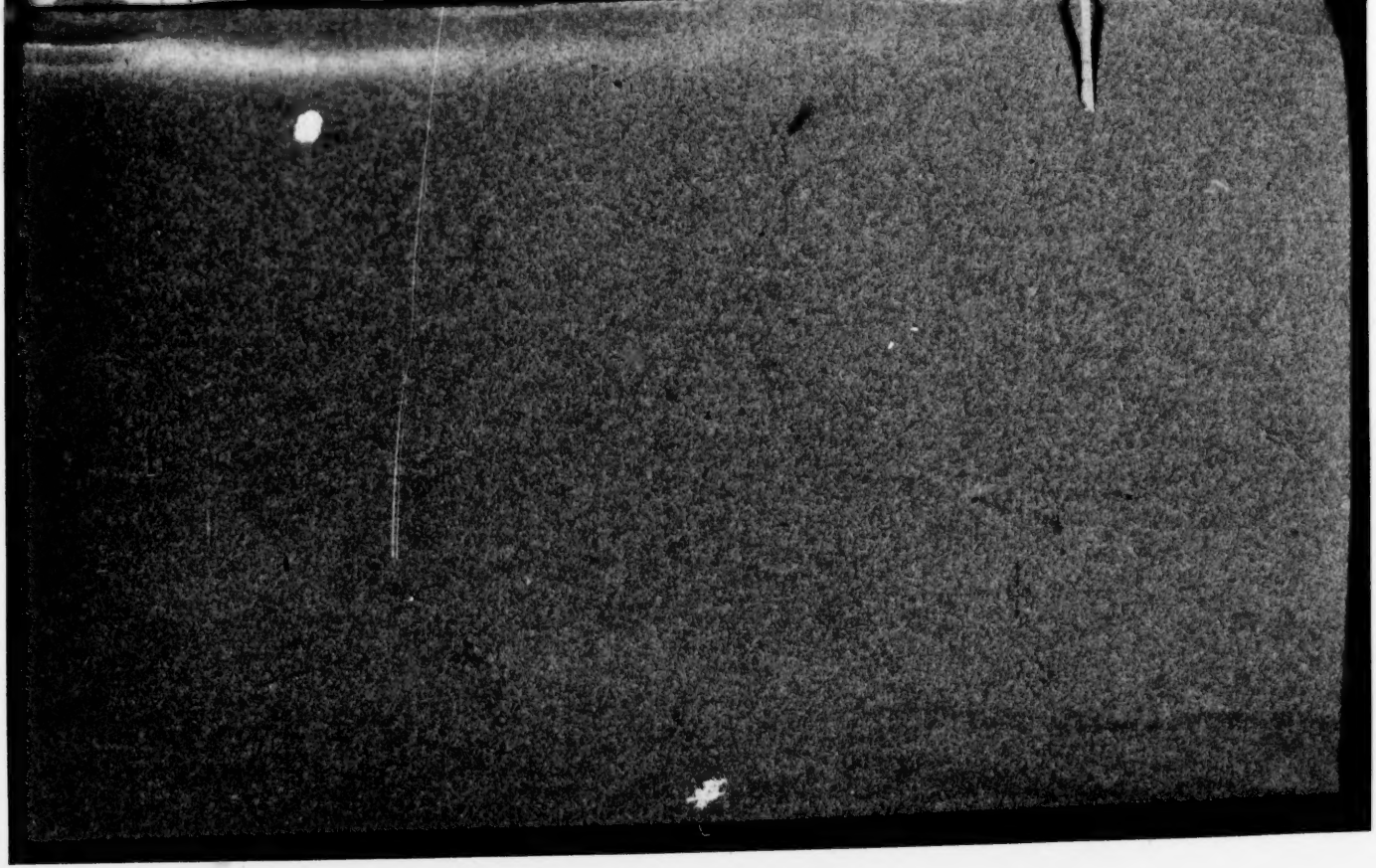

(16,973.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 126.

THOMAS W. HYDE, PLAINTIFF IN ERROR,

vs.

BISHOP IRON COMPANY ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

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1 *Citation.*

The President of the United States of America to Bishop Iron Company and Draper, Davis & Hollister, its attorneys; Fred F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph H. Sharp, John P. Johnson, N. J. Miller, and White & McKeon, their attorneys; Frank R. Webber and J. B. Richards, his attorney; Frank W. Forman and Frank B. Forman and Wilson & Vanderlip, their attorneys, and each of you, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, on the 27th day of August, 1898, pursuant to a writ of error filed in the office of the supreme court of the State of Minnesota, wherein Thomas W. Hyde is plaintiff in error and appellant below and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said Thomas W. Hyde, plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles M. Start, chief justice of the supreme court of the State of Minnesota, this 28th day of July, in the year of our Lord one thousand eight hundred and ninety-eight.

CHAS. M. START,
Chief Justice of the Supreme Court
of the State of Minnesota.

1½ [Endorsed:] United States of America. In supreme court. Bishop Iron Company, defendant in error; Thomas W. Hyde, plaintiff in error; Fred F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph H. Sharp, Jouhn P. Johnson, N. J. Miller, Frank R. Webber, Frank W. Foreman, and Frank B. Forman, defendants in error. Citation. Rec'd copy of within citation this 28th of July, 1898. Wilson & Van Derlip, att'ys for Formans. Service of this within citation admitted this 30th day of July, 1898. White & McKeon, F. White, attorneys for defendants in error, Fred F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph H. Sharpe, John P. Johnson, and N. J. Miller. Service by copy admitted July 30, 1898. Draper, Davis & Hollister, att'ys for Bishop Iron Company. Service of within citation admitted this 4th day of August, 1898. J. B. Richards, att'y for Frank R. Webber.

2 *Writ of Error.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the supreme court of the State of Minnesota and to the clerk thereof, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Minnesota, before you or some of you, being the highest

court of law or equity of the said State in which a decision could be had in the said suit between Bishop Iron Company, defendant in error, and Thomas W. Hyde, plaintiff in error; Fred F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph H. Sharp, John P. Johnson, N. J. Miller, Frank R. Webber, Frank W. Forman, and Frank B. Forman, defendants in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the question was in favor of such *of* their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest

3 error hath happened, to the great damage of the said Thomas W. Hyde, as by his answer and counter-claim appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 27th day of August, 1898, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 28th day of July, in the year of our Lord one thousand eight hundred and ninety-eight.

Seal U. S. Circuit Court, Dist of Minnesota, Third Division.

HENRY D. LANG,
Clerk of the United States Circuit Court
for the District of Minnesota.

3½ [Endorsed:] United States of America. In supreme court. Bishop Iron Co., defendant in error; Thomas W. Hyde, plaintiff in error; Fred F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph H. Sharp, John P. Johnson, N. J. Miller, Frank R. Webber, Frank W. Forman, and Frank B. Forman, defendants in error. Writ of error.

4 UNITED STATES OF AMERICA,
State of Minnesota.

In Supreme Court.

BISHOP IRON COMPANY, Plaintiff and Respondent,
vs.
THOMAS W. HYDE, Defendant and Appellant; Fred F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph H. Sharp, John P. Johnson, N. J. Miller, Frank R. Webber, Frank W. Forman, and Frank B. Forman, Defendants and Respondents.

Petition for Writ of Error.

And now comes Thomas W. Hyde, the above-named appellant and plaintiff in error herein, and says that on or about the 3rd day of May, 1898, this court entered judgment herein in favor of Bishop Iron Company, the plaintiff above named, and Fred F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph H. Sharp, John P. Johnson, N. J. Miller, Frank R. Webber, Frank W. Forman, and Frank B. Forman, defendants and respondents above named, and against this plaintiff in error, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed, to the prejudice of this plaintiff in error, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff in error prays that a writ of error may issue in this behalf to the United States Supreme Court for the correction of errors so complained of, and that a transcript of the record and proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court.

JOHN JENSWOLD, JR., AND
JOHN BRENNAN,
Attorneys for Thomas W. Hyde.

5 On consideration of the foregoing petition the prayer thereof is hereby allowed, and it is hereby ordered that a writ of error issue thereon upon the plaintiff in error, Thomas W. Hyde, giving a bond according to law in the sum of five hundred dollars, for costs, which shall operate as a cost bond simply, and not as a supersedeas bond.

CHAS. M. START,
Chief Justice of the Supreme Court of the State of Minnesota.

6 UNITED STATES OF AMERICA, }
State of Minnesota. }

In Supreme Court.

BISHOP IRON COMPANY, Defendant in Error, }
vs.
THOMAS W. HYDE, Plaintiff in Error; Fred F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph H. Sharp, John P. Johnson, N. J. Miller, Frank R. Webber, Frank W. Forman, and Frank B. Forman, Defendants in Error. } Assignment of Errors.

I.

Thomas W. Hyde, the plaintiff in error in this action, in connection with his petition for a writ of error, makes the following assignment of errors, which he avers occurred on the trial of the cause, to wit:

1. The court erred in ordering and entering judgment in favor of The Bishop Iron Company, one of the defendants in error herein, and against the said Hyde, in this:

The facts set forth in said amended answer and counter-claim and admitted to be true by the reply of the said Bishop Iron Company show that the said Thomas W. Hyde, by his settlement, improvements, and residence upon the lands in controversy and his cultivation of the same and his application to file thereon and the filing of said application, and his contest of the Warren script selection and location, and his motion to cancel the same, and the prosecution of his rights to said lands before the Department of the Interior, as in said amended answer and counter-claim specifically set forth, acquired a right to be preferred in the acquisition
7 of said lands from the United States and by virtue thereof became, was, and now is the equitable owner thereof, and that but for the erroneous, illegal, mistaken, and unwarranted rulings and decisions of the Honorable Secretaries of the Interior and the Honorable Commissioner of the Land Office the patent to said lands would, prior to the issuing of the same to the said Warren, as of right it should, have issued to the plaintiff in error, and that judgment should have been entered in his favor.

2. The court erred in finding that the Bishop Iron Company was the owner in fee of any part of the premises in controversy, for the reason that the facts set forth in the amended answer and counter-claim of the said Hyde and admitted to be true by the reply thereto show that he, the said Hyde, is the equitable owner of said premises, and that the said Bishop Iron Company holds nothing but the naked legal title to $\frac{1}{2}\frac{3}{5}$ thereof in trust for him.

3. The court erred in finding that the Bishop Iron Company was the lessee of $\frac{1}{2}\frac{3}{5}$ of said lands from the owners thereof, for the facts set forth in the amended answer and counter-claim of the said Hyde and admitted to be true by said reply show that he, the said

Hyde, was and is the equitable owner of said lands, and that the lessors of the Bishop Iron Company held nothing but the naked legal title to $\frac{1}{2}\frac{2}{5}$ of said land, subject to the rights of the said Hyde thereto.

4. The court erred in finding that the said Hyde was in the wrongful possession of said premises and has no title to or
8 interest therein, for it appears from the facts set forth in the amended answer and counter-claim of the said Hyde and admitted to be true by the reply thereto that he, the said Hyde, is the equitable owner of said lands and, as such, has been ever since 1884 and now is in the actual, open, exclusive, and rightful possession thereof.

5. The court erred in sustaining the demurrer of Fred F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph H. Sharp, N. J. Miller, and John P. Johnson, part of the defendants in error herein, to the amended answer and counter-claim of the said Thomas W. Hyde in this: the facts set forth in said amended answer and counter-claim, and which are admitted to be true by said demurrer, show that the said Hyde is the equitable owner of said lands, and that any right, title, or interest therein which each or all of said defendants may have or hold jointly or separately they each and all have and hold in trust for said Hyde.

6. The court erred in sustaining the demurrer of Frank W. Forman and Frank B. Forman, two of the defendants in error herein, to the amended answer and counter-claim of the said Hyde, for the reason that the facts set forth in said amended answer and counter-claim, and admitted to be true by said demurrer, show that the said Hyde is the equitable owner of the lands in controversy, and that any right, title, or interest therein which said defendants in error or either of them have or hold they have and hold in trust for said Hyde.

7. The court erred in sustaining the demurrer of Frank R. Webber, one of the defendants in error herein, to the amended answer and counter-claim of the said Hyde, it appearing from the
9 facts set forth in said amended answer and counter-claim, which are admitted to be true by said demurrer, that the said Hyde is the equitable owner of said land, and that any right, title, or interest which the said defendant in error has or holds in or to said lands he holds in trust for the said Hyde.

8. The court erred in ordering and entering judgment in favor of Fred F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph H. Sharp, N. J. Miller, John P. Johnson, Frank R. Webber, Frank W. Forman, and Frank B. Forman, defendants in error herein, on the amended answer and counter-claim of the said Hyde and the demurrers of the said defendants in error thereto "barring and estopping him, the said Hyde, from having or claiming any right, title, or interest, estate or property in or to any part of the said described lands adverse to said defendants" in error, in this: the facts set forth in said amended answer and counter-claim, all of which are admitted to be true by said demurrers, show that the said Hyde was and is the equitable owner of said lands.

9. The court erred in denying the motion of the said Hyde to set aside and vacate the court's findings, decision, and order for judgment herein and for a new trial, in this: (*a*) that the facts set forth in the amended answer and counter-claim of the said Hyde, which are admitted to be true by the reply of the Bishop Iron Company and the demurrers of the other defendants in error herein, show that the said Hyde is the equitable owner of the said lands, and whatever right, title, or interest which the defendants in error have or hold
10 in and to said land they and each of them hold the same in trust for the said Hyde; (*b*) that said findings, decision, and order are contrary to *to* the facts as admitted by the pleadings herein; (*c*) that said findings, decision, and order are contrary to law; (*d*) that the court erred in sustaining the said demurrers to the amended answer and counter-claim of the said Hyde.

II.

The plaintiff in error further says that in the record and proceedings in the above-entitled action there is manifest error in this, to wit:

1. It was error for the court to hold that the Secretary of the Interior had a right to consider the testimony in reference to the contract of Hyde and McDonald with their attorney taken in the case of McDonald *vs.* Eaton *et al.*, for the reason that the Secretary in considering the same acted in violation and in disregard of law and the usual and regular rules of practice of the department, and there was no such issue in said case.

2. It was error for the court not to consider the fact that the Secretary of the Interior made a mistake in reference to the testimony of the said Hyde given in the case of McDonald *vs.* Easton *et al.*

3. It was error for the court to hold that the Secretary of the Interior could properly find that an illegal contract had been made in reference to said lands, for the reason that said testimony properly read did not and does not show that he, said Hyde, ever
11 made an illegal contract in reference thereto.

4. It was error for the court to hold that the Secretary of the Interior could consider and properly did consider the testimony in reference to said contract taken upon the hearing of the said case of McDonald *vs.* Eaton *et al.* in considering the said case of Hyde *vs.* Eaton *et al.*, for the reason that said testimony was not received in the Hyde case; the only testimony in the McDonald case which was stipulated into the Hyde case was that bearing upon the legality of the location of the Sioux half-breed script No. 19 D, which was the only issue in said case.

5. It was error for the court to hold that the Commissioner of the General Land Office properly dismissed the said Hyde contest against the said Warren script selection or location, for the reason that said Commissioner had no power or authority to dismiss the said contest without notice to the said Hyde, and the decision of the Secretary, upon which he based his action, was erroneous, unlawful, and unwarranted, and made in another case in which the

question was not at issue and to which the said Hyde was not a party on incompetent, irrelevant, and mistaken testimony.

6. It was error for the court to hold that the "McDonald contest was ordered upon charges made to the Commissioner by both McDonald and the defendant" (the said Hyde), because such is not the fact as alleged in the answer of the said Hyde.

7. It was error for the court to hold that in the said McDonald contest and the contest of the said Hyde against the said scrip locations they voluntarily litigated the question as to their respective pre-emption rights, for the reason that said holding was contrary to the fact as alleged in said answer.

12

8. It was error for the court to hold that when the decision of the Secretary was made in the said contests against the Sioux half-breed scrip locations the rights of the said McDonald and of the said Hyde as pre-emptors were before him, for the reason that it is alleged in the said answer of said Hyde that said McDonald at said time had exhausted his pre-emption right, and the application of the said Hyde to file his declaratory statement on lots five and six and the S. E. ¼ of the N. W. ¼ of the said section 30 had been rejected by the Commissioner of the General Land Office on the ground that it did not antedate said Sioux half-breed scrip location No. 19 D, and no appeal had been taken therefrom, and for the further reason that the said Secretary did not decide that the rights of the said McDonald and of the said Hyde as pre-emptors were before him, but that he by virtue of his supervisory power could on incompetent, irrelevant, and immaterial testimony taken in another case before him act in a case which was not before him; which ruling was erroneous and unlawful.

9. It was error for the court to hold that the respective contests of the said McDonald and of the said Hyde "were initiated and prosecuted by the said McDonald and the defendant (the said Hyde) jointly," for the reason that it is alleged in the answer that they were initiated and prosecuted separately.

13

10. It was error for the court to hold that the said testimony in reference to the said contract was in both cases the respective contests of the said McDonald and of the said Hyde against the said Sioux half-breed scrip locations without objection or reservation.

Wherefore the plaintiff in error prays that the judgment of the said State court be reversed, and that he have judgment decreeing him to be the equitable owner of said lands and requiring the defendants in error to convey the same unto him, and for such other and further relief as may be just and for costs.

JOHN JENSWOLD, JR., AND
JOHN BRENNAN,
Attorneys for Plaintiff in Error.

14 UNITED STATES OF AMERICA, }
State of Minnesota. }

In Supreme Court.

BISHOP IRON COMPANY, Plaintiff and Respondent,
vs.
THOMAS W. HYDE, Defendant and Appellant; FRED F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph H. Sharp, John P. Johnson, N. J. Miller, Frank R. Webber, Frank W. Forman, and Frank B. Forman, Defendants and Respondents. } Order.

This 28th day of July, 1898, came Thomas W. Hyde, plaintiff in error, by his attorneys, and filed herein and presented to the court his petition praying for the allowance of a writ of error intended to be urged by him, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Supreme Court, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof the court does allow the writ of error upon the plaintiff in error, Thomas W. Hyde, giving bond according to law in the sum of five hundred dollars for costs, which shall operate as a cost bond simply and not as a supersedeas bond.

Witnesseth the Honorable Charles M. Start, chief justice of the supreme court of the State of Minnesota, this 28th day of July, in the year of our Lord one thousand eight hundred and ninety-eight.

CHAS. M. START,
Chief Justice of the Supreme Court of the State of Minnesota.

15 UNITED STATES OF AMERICA, }
State of Minnesota. }

In Supreme Court.

BISHOP IRON COMPANY, Plaintiff and Respondent,
vs.
THOMAS W. HYDE, Defendant and Appellant; FRED F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph H. Sharp, John P. Johnson, N. J. Miller, Frank R. Webber, Frank W. Forman, and Frank B. Forman, Defendants and Respondents.

Know all men by these presents that we, Thomas W. Hyde, as principal, and John G. Brown and Byron G. Segog, as sureties, are held and firmly bound unto The Bishop Iron Company, the plaintiff above named, and to Fred F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph H. Sharp, John P. Johnson, N. J. Miller, Frank R. Webber, Frank W. Forman, and Frank B. Forman, defendants above named, in the full and just sum of five hundred dollars ($500), to be paid to the said Bishop Iron Company and the defendants last above named, their certain attorneys, executors,

administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 14th day of July, in the year of our Lord one thousand eight hundred and ninety-eight.

16 Whereas at the April, 1898, term in the supreme court of the State of Minnesota, in a suit pending in said court between Bishop Iron Company, plaintiff and respondent, and Thomas W. Hyde, appellant; Fred F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph H. Sharp, John P. Johnson, N. J. Miller, Frank R. Webber, Frank W. Forman, and Frank B. Forman, defendants and respondents, a judgment was entered against the said Thomas W. Hyde, and the said Thomas W. Hyde having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Bishop Iron Company and the said Fred F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph H. Sharp, John P. Johnson, N. J. Miller, Frank R. Webber, Frank W. Forman, and Frank B. Forman, citing and admonishing them and each of them to be and appear at a session of the United States Supreme Court, to be holden at the city of Washington, on the 27th day of August, 1898:

Now, the condition of the above obligation is such that if the said Thomas W. Hyde shall prosecute said writ of error to effect and answer all costs if he fail to make the said plea good, then the above obligation to be void; else to remain in full force and virtue.

THOMAS W. HYDE.
BYRON G. SEGOG.
JOHN G. BROWN.

Sealed and delivered in presence of—

J. D. ENSIGN.
A. H. CRASSWELLER.

Approved by—

CHAS. M. START,
Chief Justice of the Supreme Court of Minnesota.

17 STATE OF MINNESOTA, } ss:
County of St. Louis, }

On the 14th day of July, A. D. 1898, before me, a notary public in and for said county, personally appeared Thomas W. Hyde, John C. Brown, and Byron G. Segog, to me known to be the persons described in and who executed the foregoing and within instrument, and acknowledged that they executed the same for their free act and deed.

[SEAL.] A. H. CRASSWELLER,
Notary Public, St. Louis Co., Minn.

STATE OF MINNESOTA, } ss:
County of St. Louis, }

Byron G. Segog and John G. Brown, being duly sworn, upon oath each for himself says that he is a resident and freeholder of the county of St. Louis and State of Minnesota and one of the sureties who signed the undertaking hereto annexed; that he is worth the sum of $500 in property within said State over and above his debts and liabilities and exclusive of property exempt from execution.

BYRON G. SEGOG.
JOHN G. BROWN.

Subscribed and sworn to before me this 14th day of July, A. D. 1898.

A. H. CRASSWELLER,
[SEAL.] *Notary Public, St. Louis County, Minn.*

17½ STATE OF MINNESOTA:

In Supreme Court, October Term, 1897.

BISHOP IRON COMPANY, Plaintiff, }
vs.
THOMAS HYDE, Defendant. }

Paper book.

Jno. Jenswold & John Brennan, attorneys for defendant.

18 STATE OF MINNESOTA:

In Supreme Court, October Term, 1897.

STATE OF MINNESOTA, }
County of St. Louis. }

District Court, Eleventh Judicial District.

BISHOP IRON COMPANY, Plaintiff, }
vs.
THOMAS HYDE, Defendant. }

Complaint.

Plaintiff for complaint and for cause of action alleges:

1. That plaintiff is, and during all the times hereinafter mentioned, has been a corporation lawfully organized and doing business under the laws of the State of Minnesota, and in said name as its corporate name.

19 2. That on the 27th day of December, 1894, plaintiff was, and ever since then has been and now is the absolute owner in fee simple, and entitled to the immediate possession of the undivided $\frac{1}{2}\frac{3}{5}$ of the following-described land situated in the county of St. Louis and State of Minnesota, that is to say: The N. E. ¼ of the S. W. ¼ of section 30, township 63 north, range 11 west of the 4th

P. M. in Minnesota, and that on the 27th day of December, 1894, plaintiff was and ever since has been and now is the lessee of the remaining undivided $\frac{12}{25}$ of said land under a lease in writing from and executed by the owners in fee-simple of said remaining undivided $\frac{12}{25}$, under and by the terms of which lease plaintiff was on the said 27th day of December, 1894, and ever since has been, and until the expiration of the full term of thirty years from March 6th, A. D. 1889, will continue to be lawfully entitled to the immediate, sole and exclusive possession of said undivided $\frac{12}{25}$ of said land not owned in fee-simple by plaintiff.

3. That on the 1st day of January, 1895, the said defendant wrongfully and unlawfully entered into and took possession of said land and every part thereof, and has ever since then wrongfully and unlawfully kept and held possession of all said land.

4. That on the 7th day of February, 1895, plaintiff demanded of defendant by a written demand then and in said county duly served upon, delivered to and left with said defendant, possession of
20 the above-described land, which demand defendant refused, and ever since then has refused, and that defendant still continues to unlawfully and wrongfully remain in actual possession of said land.

Wherefore, plaintiff demands judgment:

1. For the possession of said land.
2. For the costs and disbursements of this action.

DRAPER, DAVIS & HOLLISTER,
Attorneys for Plaintiff.

(Duly verified March 29th, 1895.)

(Endorsed thereupon:) "Filed in my office on this 3rd day of April, A. D. 1895. John Owen, clerk district court, by F. R. Miller, deputy."

(Title same as above.)

Motion for Order Bringing in Additional Parties Defendants.

Comes now the above-named defendant and moves the court for an order requiring that Fred F. Huntress, Samuel C. Brown, Frank R. Webber, Wm. C. Sherwood, Joseph H. Sharp, Christian Kortgard, Henry A. Smith, Herbert W. Coffin, A. L. Warner, John P.
21 Johnson, N. J. Miller and Frank W. Forman, appear and answer the cross-petition or counter-claim of defendant in this case as provided by statute, for the several reasons set forth in the affidavit hereto attached and pleadings on file herein, and for the further reason that they are necessary parties herein in order to have a full and just determination of this action.

JOHN JENSWOLD, JR.,
Attorney for Defendant Hyde, 306 Palladio Bldg., Duluth, Minn.

(Title same as above.)

Order for Bringing in Additional Parties Defendants.

Whereas the above-entitled action is an ordinary action in ejectment, brought by the above-named plaintiff against said defendant Hyde to recover the possession of the following premises situated in St. Louis county, Minnesota, to wit: The northeast quarter of the southwest quarter (N. E. ¼ of the S. W. ¼) of section No. thirty (30) in township No. sixty-three (63) north of range No. eleven (11) west of the 4th P. M.; and

Whereas, in said action a summons therein by which the same was commenced was dated on the 30th day of March, 1895, and was duly served upon the defendant Thomas W. Hyde on
22 the 1st day of April, 1895, which said summons was in due and legal form as required by statute, and required said defendant to answer the complaint therein within twenty days after date of service of said summons, and in case of failure thereof the plaintiff would apply to the court for the relief demanded in said complaint; and,

Whereas, said defendant Hyde has appeared in said court and served and filed his answer and a cross-petition or counter-claim against the said plaintiff and the several parties herein named, praying that he be decreed and adjudged the owner of the aforesaid premises, and for general equitable relief.

Now, therefore, the court being fully advised in the premises, upon motion of the said defendant Hyde, it is hereby

Ordered: That Fred F. Huntress, Samuel C. Brown, Frank R. Webber, Wm. C. Sherwood, Joseph H. Sharp, Christian Kortgard, Henry A. Smith, Herbert W. Coffin, A. L. Warner, John P. Johnson, N. J. Miller, Frank W. Forman, are each and all of them made parties defendants in the above-entitled action, and they and each of them are hereby required to appear and answer the said cross-petition or counter-claim of the said Hyde within twenty days after the service of this order upon said party or parties, exclusive of the day of such service, and in default thereof, that the judgment and relief demanded in said cross-petition or counter-claim
23 will be rendered against each and all of said defaulting parties in all respects as though the said party or parties had originally been made a party defendant and duly served with summons in this action.

It is further ordered: That this order be forthwith served upon the said several parties in the manner required by law for the service of a summons in a civil action.

Dated this 17th day of June, A. D. 1895.

By the court:

S. H. MOER,
District Judge.

(Title same as above.)

Amended Answer and Cross-petition.

Comes now the defendant and for an amended answer to the complaint of the plaintiff in this action alleges and shows to the court:

I.

1. He denies each and every allegation in said complaint of the plaintiff not hereinafter admitted to be true.

2. He specifically denies that the plaintiff is the owner of any part of said lands and likewise denies that it is entitled to the possession of any part thereof.

24 3. He admits that on or about the 7th day of February, 1895, the plaintiff demanded of him possession of the lands mentioned and described in the complaint herein and he then and ever since has refused, and now refuses, to deliver possession thereof to the plaintiff.

4. The defendant specifically denies that he ever wrongfully or unlawfully entered upon or took possession of said lands or any part thereof and alleges that he did, on or about the 20th day of August, 1884, peaceably and lawfully enter upon said lands and has ever since been and now is in the peaceable and lawful possession thereof.

5. The defendant admits that the plaintiff is a corporation, organized under the laws of the State of Minnesota.

II.

For further amended answer and by way of counter-claim against the plaintiff and *Fred F. Huntress, Samuel C. Brown, Frank R. Webber*, Wm. C. Sherwood, *Joseph H. Sharp*, Christian Kortgard, Henry A. Smith, Herbert W. Coffin, A. L. Warner, John P. Johnson, N. J. Miller, Frank W. Forman, Frank B. Forman, the defendant Hyde says:

1. That plaintiff The Bishop Iron Company, is now and during all the times herein stated has been a corporation duly created and organized under and by virtue of the laws of the State of Minnesota under which it was incorporated.

25 2. That defendant is now and ever since August 20th, 1894, has been in the actual, open exclusive possession of the northeast quarter of the southwest quarter of section thirty (30) in township No. 63, N. range No. 11 west, of 4th P. M., said lands being located in St. Louis county, Minnesota, and during all of said time has claimed the ownership thereof.

3. That plaintiff, and the several other parties mentioned in this counter-claim, claim some right, title and interest in and to said lands, adverse to the defendant, but said claims are without legal right or authority.

4. Defendant further alleges that on the 20th day of August, 1884, the northeast quarter (¼) of the southwest quarter (¼) of sec-

tion number thirty (30) in township number sixty-three (63) north of range number eleven (11) west of the 4th principal meridian in the county of St. Louis and State of Minnesota was vacant, unoccupied and unsurveyed lands to which the Indian title had been extinguished and belonged to the United States subject to the right of pre-emption.

5. That thereafter and prior to July 20th, 1885, the township in which said lands were and are situated and said lands were duly surveyed and the approved plat thereof was on or about said day duly filed in the lands office at Duluth, Minnesota, that being the land office in the district in which said lands were and are now situated.

26 6. That on or about the 20th day of August, 1884, the defendant was then and there and during all the time herein mentioned has been a qualified pre-emptor, whereupon on said date he settled upon said lands with the *bona fide* intention of acquiring title thereto under the pre-emption laws of the United States and immediately thereafter erected and constructed a dwelling-house thereon, cleared part thereof and cultivated the same and commenced to reside thereon and has ever since resided upon and cultivated and now resides upon and cultivates said lands, and during all said time has been and now is in the actual, open, notorious and exclusive possession thereof.

7. That when defendant commenced his residence on said land as aforesaid, on account of the same not being surveyed and the plat thereof not being filed in the land office at Duluth or elsewhere, he was unable to file on the same. That on the 20th day of July, 1885, said land being then and there subject to the right of pre-emption and after the plat of survey of said land had been filed the defendant went thereto, and in good faith, for the purpose of acquiring title thereto, duly offered and made application to file his pre-emption declaratory statement for said lands and lots 5 and 6 and southeast quarter of northwest quarter (S. E. ¼ of N. W. ¼) of said section thirty (30), and tendered to the receiver of said land office the fees required by law to be paid on such applications and filings;

27 that the local land officers of said land office received said application and informed the defendant that they would reject said application unless limited to said northeast quarter of the southwest quarter (N. E. ¼ of the S. W. ¼) of said section thirty (30); that the defendant then and there informed the said local land officers that his house and the land he had cultivated was upon said northeast quarter of the southwest quarter (N. E. ¼ of S. W. ¼) of said section thirty (30) and that he desired and intended to claim the same as a pre-emption whether or not he was successful in his contest which he then had, and which was pending against the location of the Sioux half-breed scrip No. 19 E upon said lots 5 and 6 and the southeast quarter of the northwest quarter (S. E. ¼ of N. W. ¼) of said section thirty (30); that the said land officers retained said application and informed the defendant that if he was a settler in good faith, that by what he had done his rights were as fully protected as they could be under the rules governing the disposition of public

lands. That on the said 20th day of July, 1885, but what time on said date the defendant is unable to state, the register of said land office endorsed upon his said application to file on said land the following:

"LAND OFFICE, DULUTH, MINN., *July* 20, 1885.

The within application to file D. S. on the within-described land is refused as to the S. E. ¼ of N. W. ¼ and lots 5 and 6, sec. 30, T. 63, R. 11 W., for the reason that the date of settlement alleged
28 herein does not antedate the unadjusted location of Sioux half-breed scrip No. 19 E in the name of Orile Moreau, filed for location June 16, 1883. Said unadjusted scrip location having withdrawn said land from settlement under the pre-emption law subsequent to said date of filing said scrip, to wit, June 16, 1883.

You are allowed 30 days for appeal and are advised that if you fail to do so within that time this decision will be final.

G. G. HARTLEY, *Register*."

That thereafter on the 20th day of August, 1885, the said land officers having retained said application, endorsed thereon the following, to wit: "Filed Aug. 20, 1885."

That the defendant did not know that said endorsements were made on said application and did not learn that they had been made until the 25th day of November, 1895, when he ascertained for the first time by the examination of a certified copy of said application obtained from the General Land Office that they had been made.

8. That thereafter and within the time allowed by law before August 20th, 1885, the defendant not knowing that the said endorsement made July 20th, 1885, on said application had been made, and relying upon what said land officers told him and supposing his application had entirely been rejected, appealed from their
29 decision unto the honorable Commissioner of the General Land Office, which appeal was by said local land officers on the 20th day of August, 1885, duly transmitted to the General Land Office at Washington, D. C.

9. That thereafter, to wit, on the 15th day of October, 1885, one Joseph H. Sharp, pretending and claiming to be the attorney-in-fact of one James H. Warren, an alleged mixed blood of the Chippewas of Lake Superior, to whom a certificate of identity, unlawfully and without authority was issued by the honorable Commissioner of Indian Affairs on the 22nd day of January, 1875, under the 7th clause of the 2nd section of the treaty between the Chippewa Indians of Lake Superior and Mississippi and the United States, made and concluded at La Pointe on the 30th day of September, 1854, unlawfully and without authority selected and located in the name of the said Warren said northeast quarter of the southwest quarter (N. E. ¼ of S. W. ¼) of said section thirty (30); that no notice of the filing of the said scrip was given to the defendant and that he did not know the same was filed until on or about the 10th day of April, 1886.

Defendant alleges on information and belief that the said Joseph H, Sharp was not the attorney-in-fact of the said James H. Warren,

and that the said Sharp was agent for the owner of said certificate of identity, to whom the said Warren had sold the same, and that the owner- of said certificate of identity Fred F. Huntress,
30 Samuel C. Brown, and Christian Kortgard were and are the parties for whose benefit said certificate of identity was located and said selection made, and that when said selection was made they each and all of them had notice of the rights of this defendant, and they located said scrip with the intention of defeating the defendant's claim to said land.

10. That thereafter, to wit, on or about the 10th day of April, 1886; and which was as soon as the defendant discovered that said location had been made and allowed for the said Warren by the said Sharp as aforesaid, the defendant duly made and filed in the local land office at Duluth, Minnesota, an application to contest the said selection and location of the said Warren, made by the said Sharp as aforesaid, on the ground of his prior settlement, residence and improvements upon said northeast quarter (¼) of the southwest quarter (¼) of section thirty (30) and the filing of his said application as aforesaid and the said decision of the said local land officers and his appeal as aforesaid and therein stated that he desired and intended to claim and demand his pre-emption right to the said northeast quarter (¼) of the southwest quarter (¼) of section thirty (30) according to his pre-emption filed on July 20th, 1885, whether he would be successful in his said contest against the said Sioux half-breed scrip location or not, and thereupon moved that the said location of the said Warren be cancelled, which application and motion was duly transmitted by said local land officers
31 to the honorable Commissioner of the General Land Office at Washington, D. C. That on the 22nd day of December, 1888, the honorable Commissioner of the General Land Office duly considered the said application of the defendant to contest said Warren location and his motion to cancel the same, and thereupon, by letter "H" of that date directed to the said local land officers, ordered a hearing to determine which had the superior right to said lands, the defendant or the said James H. Warren. That said order was by the honorable Commissioner of the General Land Office transmitted to the local land office at Duluth, Minnesota.

11. The defendant further alleges and shows to the court that on the 16th day of June, 1883, said section 30 being unsurveyed, Orille Moreau, by Frank W. Eaton, her alleged attorney-in-fact, illegally and without authority located Sioux half-breed scrip Nos. 19 D and 19 E on certain lands therein by metes and bounds, which location when the lands were surveyed and the plat thereof filed in said land office, were adjusted by the local land officers in the name of Orille Stram, *née* Moreau, scrip No. 19 D upon lots 3, 5 and 6, and the S. E. ¼ of the N. W. ¼ of said section 30, and scrip 19 E upon lots 1 and 2 and the S. W. ¼ of the N. E. ¼ and the N. W. ¼ of the S. E. ¼ of said section 30.

12. That on the 9th day of October, 1884, the defendant Thomas W. Hyde, filed in the said local land office, an affidavit of
32 contest, duly corroborated, against the said scrip location, made with the said Sioux half-breed scrip No. 19 D, on the

ground that the scripee, the said Orille Stram, *née* Moreau, never made any improvements whatever on said lands, either in person or by agent or attorney and that said lands at the date of the attempted locations were unsurveyed and belonged to that class of land locatable with said scrip after the scripee had made improvements on the same, and in support of his said charge said Hyde also submitted an affidavit of the said scripee in which she denied ever having given, either directly or indirectly, said Frank W. Eaton a power of attorney or any authority of any kind to locate any land with said scrip or to erect buildings and make improvements upon the land located with said scrip.

13. That in refutation of said charges, said Frank W. Eaton filed in said office certain affidavits in support of the legality of said scrip location and also certified copies of two powers of attorney purporting to be executed by the said scripee and her husband and to authorize him to select and locate, and to make the necessary improvements to enable him to locate for her said scrip.

14. That on the 15th day of October, 1884, Angus McDonald duly filed in said office an affidavit of contest duly corroborated against the said location of said scrip No. 19 E on said lots 1 and 2 and the S. W. ¼ of the N. E. ¼ and the N. W. ¼ of the S. E. ¼ of said section 30 on the ground that the said scripee never
33 made any improvements whatever on said land, either in person or by agent or attorney and that said lands, at the date of the attempted location, belonged to that class of lands only locatable with such scrip after the scripee had made improvements thereon.

15. That in support of said charges, the said Angus McDonald also submitted the said affidavit of Orille Stram and the said Frank W. Eaton opposed the allowance of said contest on the same papers and powers of attorney upon which he opposed the said contest of the defendant. That the said applications to contest the said scrip locations of S. H. B. Nos. 19 D and 19 E duly came on for hearing before the Assistant Commissioner of the General Land Office and he, on the 14th day of November, 1885, by letter "C" of that date, a true and correct copy of which is hereto annexed and marked Exhibit "A" ordered a hearing to determine the legality of said scrip locations Nos. 19 D and 19 E.

16. That said order was duly transmitted to the said local land office and on the 17th day of November, 1885, the register and receiver of said land office duly fixed as a day for hearing in each of said cases, the 6th day of April, 1886, and duly issued notice thereof in the case of the said Angus McDonald, a true and correct copy of which is hereto annexed marked Exhibit "B" and made a part hereof, and also at the same time issued a notice of said hearing in the case of the defendant, a true and correct copy of which
34 is hereto annexed, marked Exhibit "C" and made a part hereof.

17. That the foregoing were all the issues made in the aforesaid contests.

18. That the said contest of Angus McDonald came on for hear-

ing pursuant to said notice which was duly served before the register and receiver of the said local land office, and said order and all parties thereto appeared and submitted evidence, and that on said hearing there was erroneously and contrary to law, admitted, taken and received the following irrelevant, incompetent and immaterial testimony of the defendant and of the said Angus McDonald and of S. F. White, to wit:

Testimony of S. F. White.

"S. F. WHITE, being duly sworn upon oath deposes and says: I am one of the attorneys for the contestant; I have made careful search through my safe and among all my papers for the contract of security given me by the *contestants* in these cases to secure me for advances and legal services and I am unable to find it. I supposed until about two or three days before the day set for hearing that it was in the files of the case in my office, but I have looked through that and could not find it and have made a careful search through my safe and among all my papers where I thought it could be, and have continued that search at various times up to this morning when I made a last final search through my safe and have been unable to find it and have no idea where it is."

Testimony of Mr. Hyde.

Q. "Did you have any contract with Mr. White in writing or otherwise by which he was to receive any compensation or interest in the land?

A. Yes, there was a contract.

Q. Where is it?

A. I don't know.

Q. When and where did you see it last?

A. I have not seen it since it was drawn by Mr. White.

Q. What did it contain?

A. It contained when I proved up on the land I was to secure him on a one half interest.

Q. Who witnessed the contract?

A. Powers, McDonald and myself and Mr. White were together; that is all I recollect. I can't say whether Powers witnessed it or not. The last I knew of the contract Mr. White had it. Mr. Powers was not included in the contract with McDonald and myself and White."

Mr. McDonald's Testimony.

"Mr. White has furnished me the supplies to keep me on the claim. I am making the improvements for myself. I don't know of any one being interested in the claim except myself. Judge White has no interest in it. There is an understanding that he is to have an interest in it if we succeed in this trial. He is to have a half interest. I know R. D. Mallett; he has no interest in the claim, he is not going to have any.

The arrangement with Hyde is the same as mine. White is to have half if we succeed in this. James H. Powers is also to have an interest in it if we succeed. I don't know how much he is to get. I agreed to give him an interest if we succeeded in getting the land. Mr. Hyde went after Powers to come and testify in the case. I never had any talk with Mallett about the claim. Mr. White is paying the expenses of the claim with the understanding that he is to have a half of it if we secure it."

Redirect:

Q. The half interest you speak of Mr. White is to have was to be a deed of or security upon a half of the land for advances and services?

A. It was a security.

Q. This interest you have spoken of as to Mr. Powers and which you say you cannot fix the amount of, what was that? Was it not simply that he was to be paid for his time and services and there was no telling how much he would have to put in it?

A. He was to be paid for his time: that is all I mean by an interest he was to have.

Cross-examination:

I am to let him have an interest in the land when I get
37 it to pay him for his time and services. The contract I have with Mr. White for this one-half is in writing.

Q. When you get this land is it not the understanding between you and Mr. White that you are to deed him an undivided one-half interest in it?

A. No, sir; we never mentioned a deed.

Q. What do you mean then by saying that White was to have a half interest?

A. To secure him for advances.

Q. Then if it was to secure him for advances made, how can you give him a half interest unless you deed him one-half?

A. I could not very well.

Q. Then your understanding is you are to deed him one-half interest in it?

A. No; that is not my understanding.

Q. Really you do not know anything about it do you?

A. I know my own transaction about it, but I don't know White's."

19. That no further or other evidence was taken on either of said hearings relative to the said contract, with the said White.

20. That at the conclusion of the taking of testimony on the said hearing in the said contest of Angus McDonald, all the parties to the said contest of the defendant against the said location of scrip No. 19 D, being present at the hearing thereof, made and entered into a stipulation, whereby it was stipulated and agreed that the

testimony in the said McDonald case should be considered
38 in determining the validity of the said location of scrip Nos. 19 D and 19 E, which stipulation was and is as follows:—

"It is hereby stipulated and agreed upon that this testimony (meaning the testimony in the McDonald case) shall be considered in determining the validity of both locations of scrip 19 D and 19 E (meaning the locations hereinbefore mentioned)."

That no testimony or evidence whatsoever, other than that received under said stipulation was taken, admitted, or received on the hearing of the said contest of the defendant against the said location of scrip 19 D, and that was admitted for the purpose, and that only, of determining the validity of said scrip location No. 19 D. That the question as to the validity of said scrip location No. 19 D was the only issue in the said contest of this defendant and that of the said McDonald. That thereupon on the said evidence and stipulation, the said local land officers erroneously and contrary to law, decided and held both of said scrip locations valid.

That from said decision, both the defendant and the said Angus McDonald appealed to the honorable Commissioner of the General Land Office on the grounds:

1st. Because the register and receiver were never authorized or directed to decide said cause.

2d. Because the so-called decision is contrary to the evidence and the facts.

39 3d. Because the so-called decision is contrary to law.

4th. Because the so-called decision treats the case as though the contest was one between the scripee and her attorney, whereas, it grew out of a contest by third parties who claim and have shown that the scrip entry was fraudulent on the part of both the scripee and her grantees.

5th. The local land officers in their so-called decision failed to pass upon the vital question in the case, viz.—whether the land contained improvements made by, or under the personal supervision or direction of the scripee and that they were for her personal use and benefit.

That the said appeals of the defendant and Angus McDonald came on for hearing before the honorable Assistant Commissioner of the General Land Office, and he, on the 4th day of August, 1888, by letter "H" of that date, a true and correct copy of which is hereto annexed, marked "Exhibit D," and made a part hereof, cancelled said scrip locations Nos. 19 D and 19 E on the ground that "the evidence showed conclusively the scripee never saw the land or the improvements, or had anything whatever to do with either," and rejected the defendant's application to file on said lands so far as it related to said lots 5 and 6 and the S. E. ¼ of N. W. ¼ of said section 30.

40 That said Frank W. Eaton appealed from the said decision of August 4th, 1888, unto the honorable Secretary of the Interior, and said appeal came on for hearing before said Secretary (Wm. F. Vilas) and after considering the same, he, on the 18th day

of February, 1889, affirmed said decision, but erroneously and contrary to law, declared said lands open to entry by the first legal applicant.

The defendant further alleges that his said appeal from said rejection of his said application to file as pre-emptor, so far as it related to said lots 5 and 6 and the southeast quarter of the northwest quarter of said section 30, had been determined by the said Commissioner as aforesaid and was not before the said Secretary. That at said time the said McDonald had exhausted his pre-emption right which fact was before said decision brought to the attention of said Secretary (Wm. F. Vilas).

That prior to said decision of Secretary Vilas, no charge was ever made or filed against the right of either the said Hyde or McDonald in either of said cases to file on said lands or any lands as pre-emptors, and on the question of the defendant's good faith in making said application to file on said lands as aforesaid he has never had a hearing or his day in court. That notwithstanding the fact that said McDonald had exhausted his pre-emption right, and that the said appeal of the defendant from the rejection of his said application to file on said lands as a pre-emptor as aforesaid, was not in issue in either of said cases or before said Secretary, and that
41 the defendant never had a hearing on his right to file on said land as a pre-emptor, it was erroneously and contrary to law, determined by the said Secretary that the defendant's said appeal from the rejection of his said application to file on said lands as a pre-emptor, and both the rights of he and McDonald as pre-emptors were in issue and that a hearing had been had thereon, and by mistake as to what the testimony of said Hyde was, on said evidence mistaken, as hereinafter stated, erroneously and contrary to law decided that said testimony showed that it was impossible for the defendant to make the affidavit required by § 2262 of the Revised Statutes of the United States, "that he had not directly or indirectly made any agreement or contract in any way or manner, with any person whatever, by which the title which he might acquire from the Government of the United States should inure in whole or in part to the benefits of any person except himself, and that his application to file should be treated as though it had been filed and that it ought to be cancelled if filed." That the said mistake in reference to said testimony, consisted in misquoting and mistaking the answer of the said Hyde in his testimony, hereinbefore set forth to the question as to what the contract with Mr. White contained. That the said answer to said question as it in fact was and is, is as follows: "It contained that when I proved up on the land I was to secure him *on* a half interest" and it was mistaken and misquoted so as to read—"It contained, that when I proved up I was to secure him a half interest."

42 That thereafter the defendant duly made a motion to review said decision on the ground of said mistake, and that his rights as a pre-emptor were not in issue in said contest, and that it was error for said Secretary to hold that said lands were open to entry by the first legal applicant. And thereafter the same came

on for hearing, and on the 28th day of January, 1891, the honorable Secretary of the Interior (John W. Noble) modified said decision by holding and deciding that the preference right of entry of neither the said Hyde nor McDonald was decided thereby, but erroneously and contrary to law denied said motion in all other respects.

That on the 8th day of March, 1889, and prior to the date of the decision of the said Secretary (John W. Noble) the honorable Commissioner of the General Land Office, without notice to the defendant, erroneously and without warrant and without authority of law, based upon said erroneous, unwarranted, and illegal decision of February 18th, 1889, of the Secretary of the Interior (Wm. F. Vilas), revoked said order of December 22nd, 1888, by which a hearing was ordered, on the application of the defendant to contest and his motion to cancel the said location of the said Warren scrip.

That thereafter, and immediately upon learning that the said order for a hearing had been revoked, the defendant, on or about the 6th day of July, 1889, duly moved to set aside said revoking order of March 6th, 1889, which motion the honorable Com-
43 missioner of the General Land Office unlawfully and wrongfully neglected to pass upon, and same has not been acted upon by him.

That on the 19th day of March, 1889, Emil Hartman filed in said local land office an application to contest the said entry of the said Warren, which was refused, and the said Hartman appealed from said action to the honorable Commissioner of the General Land Office; that on the 23rd day of February, 1889, one Joseph H. Chandler applied to locate Valentine scrip on said lands, which application was rejected by the local land officers for conflict with the said Warren location; that other applications were made to contest said Warren location and enter said lands and rejected by the local land officers and appeals taken therefrom to the honorable Commissioner of the General Land Office; that the appeals of all said parties were considered by the honorable Commissioner of the General Land Office, and he on October 16th, 1889, erroneously and contrary to law held that the said location by the said Warren was valid and affirmed the action of the local land officers in rejecting the said application of the said Chandler and others to enter said lands, and that said affidavit of contest of the said Hartman was first in time as between him, Chandler, and said other parties, and that the same and the affidavits in support thereof did not present sufficient grounds to order a hearing and erroneously and contrary to law failed, refused, and neglected to pass upon the said motion of the
44 defendant to reinstate his said contest against the said Warren scrip location. That from the said decision of the honorable Commissioner of the General Land Office, all parties thereto including the defendant and excepting said Warren, duly appealed to the Secretary of the Interior and by stipulation of counsel for the defendant, the said Hartman and all others interested therein, the said appeals came on for hearing before the honorable Secretary of the Interior on the 19th day of October, 1891, and after considering the same, the honorable Secretary of the Interior on the 31st day of

May, 1892, erroneously and contrary to law, based on the said illegal, unwarranted and erroneous decision of the Secretary of the Interior (Wm. F. Vilas) of February 18th, 1889, decided "that the defendant could claim nothing by virtue of his pre-emption claim to said N. E. ¼ of S. W. ¼ of section 30," and directed the honorable Commissioner to order a hearing upon Hartman's said allegations of contest. That thereafter and in due time, the defendant duly made and filed a motion for review of the said decision of the honorable Secretary of the Interior of May 31st, 1892, based on the following and other assignments of error:

1. Error in passing upon the rights of Hyde as a pre-emption claimant or otherwise, without giving him any hearing whatsoever in this case.

2. Error in holding that as to James H. Warren, and his
45 scrip location, Hyde's right as a pre-emption claimant was *res adjudicata.*

3. Error in utterly disregarding Hyde's claim to the land in question.

4. Error in neglecting and refusing to give Mr. Hyde a hearing upon the merits of his claim in his case.

5. Error in holding that the Warren scrip location, or that the claims of any of the contestants, took priority of, or were superior to the claim of Hyde to this land.

6. Error in utterly and entirely failing to give Hyde his day and hearing in court as against the Warren scrip.

7. Error in holding that what occurred in another case, and between different parties to the record was *res adjudicata* as to the Warren claim in this case.

That thereafter, to wit: on the 12th day of November, 1892, the said Secretary, based on erroneous, illegal and unwarranted decision of Secretary Vilas erroneously and contrary to law, denied said motion.

That thereafter and in accordance with said decision of the honorable Secretary of the Interior, the honorable Commissioner of the General Land Office, ordered a hearing on the said contest of the said Hartman, notice of which was duly given and the same came on to be heard before the said local land officers at Duluth,
46 Minnesota, between the 17th day of January and the 9th day of February, 1893, at which time and place defendant duly appeared and applied to be made a party thereto and be heard and offered evidence in support of his said settlement, residence and improvements upon the said lands, which applications and offers were erroneously and contrary to law rejected and denied by the said local land officers.

That the defendant duly appealed from said action of said local land officers unto the honorable Commissioner of the General Land Office. That said appeal came on for hearing in due time before the said honorable Commissioner, and he, on the 21st day of August, 1893, erroneously and contrary to law, based upon the said decision of Secretary Vilas, decided that the defendant had no standing in said case and that no error was committed by the register and re-

ceiver of the said local land office in refusing to recognize him as a party, or in declining to receive the testimony offered by him. That in due time the defendant duly appealed from the said decision of the said honorable Commissioner, dated August 21st, 1893, unto the honorable Secretary of the Interior. That the said appeal in due time came on for hearing before the Secretary of the Interior and that thereafter, to wit, on the 20th day of July, 1894, the said Secretary, erroneously and contrary to law, based upon the said decision of Secretary Vilas, decided said appeal and affirmed the decision of said honorable Commissioner and directed that
47 the entry of said Warren be held for patenting.

The defendant further alleges and shows to the court, that pursuant to and in accordance with the erroneous and unwarranted decisions of the Secretaries of the Interior and in derrogation of the rights of the defendant on the 22d day of December, 1894, a patent from the United States to said lands, erroneously and without authority of law, issued to the said James H. Warren.

That the defendant by his said settlement, improvements and residence upon the lands in controversy and his cultivation of the same and his said application to file thereon, and the filing of said application as aforesaid *and* the premises, and his said contest of the said Warren location and his said motion to cancel the same and the prosecution of his rights to said land before the Department of the Interior as hereinbefore stated and specifically set forth, acquired a right to be preferred in the acquisition of said lands from the United States and by virtue thereof and of the premises, became, was, and now is, the equitable owner thereof and that but for the said erroneous, illegal and unwarranted rulings and decisions of the honorable Secretaries of the Interior, as aforesaid, the patent to the said lands would long since and prior to the issuing of the same to the said Warren, as of right it should have been issued to the defendant.

The defendant further alleges that each and all of said
48 parties, including the plaintiff, had knowledge and notice of the claims of the defendant prior to the issuing of said patent to the said Warren, and the time they respectively acquired their and each of their alleged interest and of said erroneous, illegal and unwarranted rulings and decisions of the Secretaries of the Interior.

The defendant further alleges that the plaintiff claims to be the owner of an undivided $\frac{1}{2}\frac{3}{8}$ of the fee to said N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of said section 30, and also claims to have a mining lease of the remaining $\frac{1}{2}\frac{2}{8}$ of said lands from parties who claim under the said Warren.

The defendant further alleges on information and belief that Fred F. Huntress, Samuel C. Brown, Frank R. Webber, W. C. Sherwood, Joseph H. Sharp, Christian Kortgard, Henry A. Smith, Herbert W. Coffin, A. L. Warner, John P. Johnson, N. J. Miller, Frank W. Forman, Frank H. Forman, Emil Hartman, Richmond D. Mallett, the Germania Iron Company, a corporation organized under the laws of the State of Minnesota, Andreas M. Miller and Robert

Spencer, each claim to have an interest under the said Warren in the said northeast quarter of the southwest quarter of said section 30, but the nature, character and extent of each and all of said claims the defendant is unable to state with greater particularity and that each and all of said last-mentioned parties are necessary parties to this action and that a complete determination of the controversy herein cannot be had without their presence, and
49 that in the furtherance of justice it is necessary and proper that they be made parties to this action and that by so doing a multiplicity of actions will be avoided.

Wherefore, the defendant prays that the court order that each and all of said parties be made parties to this action and they each and all be required to make and file an answer to the defendants' counter-claim within such time as the court may direct and that the defendant have judgment decreeing that all of said parties may be adjudged to hold the title to said northeast quarter of the southwest quarter of section thirty in township sixty-three north of range eleven west, in the county of St. Louis and State of Minnesota, in trust for the use and benefit of the defendant, and further ordering and decreeing that the title to said lands be divested out of said defendants and vested in the defendant, and for such other and further relief as may be just and equitable.

JOHN JENSWOLD, JR.,
Defendants' Attorney.

JOHN BRENNAN, *Of Counsel.*

(Duly verified.)

50 EXHIBIT "A."

Letter C, Nov. 14th, 1885.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Nov. 14th*, 1885.

Register and receiver, Duluth, Minnesota.

GENTLEMEN: On the 16th of June, 1883, Frank W. Eaton, attorney-in-fact, filed Sioux half-breed scrip No. 19 letters D and E issued to Orille Moreau upon a tract of unsurveyed land described by metes and bounds. It is stated that when this tract of land is officially surveyed the filing made with scrip 19 D will embrace the W. ½ of N. W. ¼ of sec. 29, and the S. E. ¼ of N. E. ¼ and the N. E. ¼ of S. E. ¼ of sec. 30, and the filing made with 19 E will embrace the S. W. ¼ of N. E. ¼ and E. ½ of N. W. ¼ and S. W. ¼ of N. W. ¼ of sec. 30, twp. 63 N. R. 11 W. 4th principal meridian.

On the 31st of October, 1884, the register transmitted the applications of Angus McDonald and Thomas W. Hyde by their attorneys, Messrs. White & Brown, to respectively contest said locations upon the ground that the scripee never made any improvements whatever on said land either in person or by an agent or attorney, and that said land at the date of the attempted location, was unsur-

veyed and belonged to that class of land only locatable with such scrip after the scripee shall have made improvements upon
51 the same. In support of this statement they submitted copy of an affidavit by the scripee in which she states that she never at any time made, constituted or appointed Frank W. Eaton her true and lawful attorney, and that she never at any time either directly or indirectly in any manner gave him any authority to select and locate any lands with said pieces of scrip, or to make any improvements upon the lands in question, or upon any other lands for her use and benefit.

On the contrary said Eaton, through his attorneys Curtiss and Bardett, submitted certain papers in support of the legality of said locations, including certified copies of two powers of attorney executed apparently by said scripee and her husband (original powers on file in this office with location papers) which authorized him to select and locate each piece of said scrip 160 acres of public land and if the land so selected be unsurveyed, to make thereon in her stead and for her personal use and benefit, the improvements necessary to the proper location of the scrip upon unsurveyed land. Mr. Eaton claims, and it so appears from the papers submitted and the locations above referred to, that he, under the authority thus vested in him by said scripee and her husband, made valuable improvements upon the lands in question and located the same with said pieces of scrip in entire good faith and in full compliance with the requirements of the law relating to the location of this class of scrip and the regulations of this office prescribed thereunder.
52 Therefore he requests that the applications of said McDonald and Hyde for a hearing in this matter be rejected.

In view of the conflicting statements respecting the legality of these locations, I deem it proper that a hearing should be had that the respective parties may have an opportunity to submit such proof as they may have in support of their allegations and that this office may be possessed of all the facts possible in the matter, and the same is hereby ordered.

You will notify all parties in interest of the time and place of hearing, and at the proper time thereafter you will transmit to this office the testimony taken thereat with your joint opinion thereon.

Very respectfully, S. M. STOCKSLAGER,
Ass't Commissioner.

EXHIBIT "B."

U. S. LAND OFFICE,
DULUTH, MINN., *Dec. 17th*, 1885.

In the matter of S. H. B. scrip No. 19 letter E, by Frank W. Eaton, the attorney-in-fact of the scripee Orille Moreau, upon lots 1 and 2, southwest quarter of northeast quarter, section 30, township 63 north, range 11 west, on the 21st day of July, 1885, you are hereby advised that upon the allegations of Angus McDonald
53 and Thomas W. Hyde, that the above-named scripee never made any improvements whatever upon west half of north-

west quarter section 29, and southeast quarter of northeast quarter and the northeast quarter of the southeast quarter of section 30, of said township 63, range 11 west, and the allegations of said scripee that she never at any time made, constituted or appointed Frank W. Eaton her true and lawful attorney, or in any manner gave him any authority to select and locate any lands with said piece of scrip, or to make and build improvements on the land in question or upon any land for her use of benefit the honorable Commissioner of the General Land Office, by letter "C" of November 14th, 1885, instructed the register and receiver of the local land office to inquire into and determine the truth of those allegations. Accordingly you are summoned to appear at this office on Tuesday, April 6th, 1886.

G. G. HARTLEY, *Register.*
E. G. SWANSTROM, *Receiver.*

To White & Reynolds, attorneys for Hyde and McDonald and Moreau, Duluth, Minn.

EXHIBIT "C."

U. S. LAND OFFICE,
DULUTH, MINN., *Dec. 17th*, 1885.

54 In the matter of S. H. B. scrip No. 19 letter D, by Frank W. Eaton, the attorney-in-fact of the scripee, Orille Moreau, upon lots 3, 5 and 6, southeast quarter of northwest quarter, section 30, township 63 north, range 11 west, on the 21st day of July, 1885, you are hereby advised that upon the allegations of Thomas W. Hyde and Angus McDonald, that the above-named scripee never made any improvements whatever upon lots 3, 5 and 6, and southeast quarter of northwest quarter of section 30, of said township 63, range 11 west, and the allegations of said scripee that she never at any time made, constituted or appointed Frank W. Eaton her true and lawful attorney, or in any manner gave him any authority to select and locate any lands with said piece of scrip, or to make and build improvements on the land in question or upon any land for her use and benefit, the honorable Commissioner of the General Land Office, by letter "C" of Nov. 14th, 1885, instructed the register and receiver of the local land office to inquire into and determine the truth of those allegations. Accordingly you are summoned to appear at this office on Tuesday, April 6th, 1886.

G. G. HARTLEY, *Register.*
E. G. SWANSTROM, *Receiver.*

To White & Reynolds, attorneys for Hyde and McDonald and Moreau, Duluth, Minn.

55 EXHIBIT "D."

"H."
Doc. 1.—Case 681.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASH., D. C., *Aug.* 4, 1888.

THOMAS W. HYDE and ANGUS MCDONALD
vs.
FRANK W. EATON, Attorney-in-fact for Orille Stram, *née* Moreau.

S. H. B. scrip 19 D and 19 E.

Register and receiver, Duluth, Minn.

GENTLEMEN: I have considered the above-entitled case appealed by the contestants from your decisions in favor of the defendant.

The record shows that June 16th, 1883, Orille Stram *née* Moreau, a Sioux half-breed Indian, by her attorney-in-fact, Frank W. Eaton, filed in the Duluth, Minn., local land office, Sioux half-breed scrip No. 19 D and 19 E, each for 160 acres, dated Nov. 24th, 1856, issued to said Orille Stram *née* Moreau, under the act of July 17, 1854, U. S. States at Large, vol. 10, p. 304, by virtue of which said Eaton located, as such attorney-in-fact for said Stram 320 acres of unsurveyed land, and that on July 21st, 1885, said locations were adjusted by the local land office at Duluth, Minn., and approved and posted by this office Sept. 9th, 1885, to embrace lots 3, 5, 6, and S. E.
56 ¼ N. W. ¼ sec. 30, T. 63 N., range 11 W., as adjusted to the location made under said scrip 19 D, and under scrip location 19 E to embrace lots 1 and 2, and S. W. ¼ N. E. ¼ and N. W. ¼ S. E. ¼ same section.

On July 20th, 1885, Angus McDonald presented a pre-emption application for lot 2, N. ½ S. E. ¼ and S. W. ¼ N. E. ¼ of said section, which you rejected because the N. E. ¼ S. E. ¼ is denominated swamp and overflowed land, and as to the remaining tract so applied for, because the date of settlement alleged in the application does not antedate the unadjusted scrip location No. 19 E. At the same day and date you also rejected a like application presented by Thos. W. Hyde for lots 5 and 6, S. E. ¼ N. W. ¼ and N. E. ¼ S. W. ¼ of the same section, for the reason that the alleged settlement does not antedate the unadjusted scrip location No. 19 D.

On Nov. 14, 1885, upon the application of the contestants in the case, a hearing was ordered by this office on the allegation "that the scripee never made any improvements whatever on said land, either in person or by an agent or attorney and that the said land, at the date of the attempted locations, was unsurveyed and belonged to the class of land only locatable with such scrip after the scripee shall have made improvements upon the same."

And in support of these charges there was submitted a copy of an affidavit made Oct. 9, 1884, by the scripee in which she
57 denied ever having given, either directly or indirectly, said Frank W. Eaton a power of attorney, or any authority of

any kind to locate any land with said scrip, or to erect buildings and make improvements upon the land in controversy, or upon any other land for her use and benefit.

In refutation of such denial by the scripee the defendant's attorney-in-fact filed copies of two powers of attorney given to him, said Eaton, by said scripee and her husband, May 25th, 1883, conferring upon him the necessary power and authority to locate said scrip, and to make the improvements required by said act of July 17th, 1854, upon any land subject to location by said scrip, and to do any other act necessary to be done in the premises, in order to secure a permanent and *bona fide* location, in the same manner as if done by them personally.

A trial was had April 6th, 1886, resulting in a judgment as stated. In their appeals the contestants assign six specifications of error, as follows, to wit: 1st. The register and receiver had no authority to render a decision upon the law or facts in the case. 2nd. Their so-called decision is contrary to the evidence. 3rd. It is contrary to the law. 4th. The so-called decision treats the case as if the controversy was between the scripee and her attorney in-fact. 5th. In the so-called decision, the vital question in the case is not passed upon, namely, whether the land involved contained improvements made by or under the personal supervision or direction of
58 the scripee, and also for her personal use and benefit. And 6th. In finding that a confirmatory deed made between two of the parties to a fraudulent entry of Government land bars the right of subsequent *bona fide* applicants.

Pending the foregoing proceedings Fred L. Huntress filed in the local land office at Duluth, Minn., an application to contest the S. H. B. S. locations made by said Eaton, as attorney-in-fact for the scripee above mentioned.

This application was transmitted by the register May 5th, 1887, to this office for its consideration and action and was returned Nov. 29, 1887, with instructions that it be held subject to the final disposition of the case at bar. Accompanying the said certificates or scrip, and applications to locate the same are what purports to be the original powers of attorney, given by the scripee, and her husband, May 25th, 1883, to said Frank W. Eaton and an affidavit by the latter, with each application, stating that, as such attorney, he caused to be built upon each of the tracts located on as described heretofore, a house 14 by 16 feet, one story high of timber, covered with split shingles, with doors and windows, and has also had cleared ready for cultivation one-half an acre of each tract, and that these improvements were made under the personal direction of said Orille Stram, and for her personal use and benefit under the authority of and by virtue of the said power of attorney. Accompanying the records of the case are what also purports to be the original powers of attorney, given May 25th, 1883, by the
59 said Orille Stram and her husband, to Leonidas Merritt, granting to him full power to enter upon and take possession of any and all pieces or parcels of land in the State of Minnesota, which they then owned, or may hereafter acquire, or become in-

terested in, by virtue of the location of said scrip, to prosecute and defend any suits at law in the courts of said State, and to grant, bargain, sell, demise, lease, convey and confirm said lands, or any part thereof, by deed, conveyance, demise or lease in the same manner as if performed by them individually.

There are also filed with the records, copies (certified) of two warranty deeds, dated July 2, 1883, and executed in the same of said Orille Stram, and her husband Roman Stram, by Leonidas Merritt, under and by virtue of this power of attorney referred to, conveying, for the nominal consideration of $25,000 in each to Edward Bryne, James N. Powers and Joseph Clement, an undivided one-third interest in and to all the land embraced in said scrip location and involved in this controversy. These are also filed in the case, certified copies of two warranty deeds, bearing date July 6th, 1883, executed in the same manner by the same parties of the first part, conveying to Frank W. Eaton of Duluth, Minn., for the nominal consideration in each of $25,000, an undivided (⅔) two-thirds interest in and to the said tracts of land.

On the 28th day of August, 1883, Jos. Clement, one of the grantees above referred to, it appears by certified copies, also filed in
60 evidence, of two deeds of warranty, conveyed to one Nicholas Lastnerf, of Milwaukee, Wisconsin, for the nominal consideration in each of $250, his undivided one-ninth interest in and to said tracts, and the next day, August 29th, 1883, as shown by certified copies filed with the record, James H. Powers executed two similar deeds, conveying to said Lansterf for the nominal consideration of $350 in each, all his undivided one-ninth interest in and to said land.

A certified copy of a quitclaim deed executed Aug. 29, 1894, by Leonidas Merritt, under and by virtue of his power of attorney in the name of Orille Stram and her husband, is filed also in which for the consideration of one dollar they released and quitclaimed to James H. Powers in order to correct an imperfect description contained in the prior warranty deed of July 2, 1883, between said parties of the first part and Edward Byrne, James H. Powers and Joseph Clement, all their interest in and to the undivided one-ninth interest, previously conveyed to said Powers of the N. E. ¼ N. W. ¼, S. ½ N. W. ¼ and the S. W. ¼ of N. E. ¼ of said sec. 30, and the next day Aug. 30, 1884, said Powers released and quitclaimed to said Nicholas Lansterf, for the consideration of one dollar, as shown by a certified copy of a quitclaim deed executed on that day between said parties, in order to correct the misdescription above referred to, all his interest in and to an undivided one ninth interest in the tract last referred to.

61 The 26th of Sept. 1884, as shown by a certified copy of a quitclaim deed filed with the case, the said Orille Stram, her husband, by Leonidas Merritt, under and by virtue of his power of attorney, released and quitclaimed to said Joseph Clement, for the purpose of correcting a misdescription in a warranty deed, dated July, 1883, between said parties of the first part and Edward Byrne, James H. Powers and Joseph Clement, all their interest in and to

the undivided one-ninth interest in the N. E. ¼ N. W. ¼ S. ½ N. W. ¼ and S. W. ¼ N. E. ¼ of said sec. 30. There is no record evidence offered that said Clement ever executed a quitclaim deed of his interest in the last-named tract, as did Powers, of his interest in the same tract, in order to rectify the alleged error in description to said Lansterf.

It will be observed that, as far as the facts presented disclose Powers and Clement each divested himself of his one-ninth interest in both these tracts to Nicholas Lansterf; that Bryne retained his one-ninth interest, and Frank W. Eaton his two-thirds interest, as attorney-in-fact for the scripee, and that up to the trial of this case, as far as the record discloses, such was the state of the several parties named, and their interest in and to any of the land in question.

The several deeds of conveyance and release conferred no greater title upon the grantees than the grantors had, which was simply a right to these tracts of land subject to the final adjudication and approval of these locations.

62 Prior, however, to the trial, the said Orille Stram, and her husband, Roman Stram, on March 31st, 1886, joined in a deed of confirmation, ratifying and confirming all and singular the acts, as attorney-in-fact of the said Frank W. Eaton and Leonidas Merritt, in the premises relating especially to the tracts of land involved in this case.

The evidence related at the hearing, I think, established by a clear preponderance, the fact that, said Eaton by virtue of his power of attorney, employed Edward Byrne, to make the improvements upon the respective tracts in question, and that Byrne secured the services of Powers and Clement to assist him in the matter—Eaton admits that the power of attorney given to him by said scripee was executed in blank, and that he never saw such scripee until March 31st, 1886, never saw the land himself and did not know whether said scripee ever saw it or not, and there is no other evidence on that point. The deed of confirmation above referred to, appears, as far as Eaton and the scripee are concerned, to remove any objection to the former's acts, prior thereto, under and by virtue of his said power of attorney.

The affidavits accompanying the placing of said scrip, appear to fulfil the requirements of the circular of March 26th, 1878.

The contestants herein did not claim settlements under their respective applications, to make pre-emption filings upon

63 those tracts of land, until more than a year after the location of the scrip involved in this case.

They admit, in their testimony, that the improvements placed upon these tracts, the year before, they found in an impaired condition, August 20th, 1884, when they went thereon. The only other question, it appears, that is left for me to pass upon, touching the legality of these locations, since it is upon the charge of their illegality that the case is based, is, whether the power of attorney given to Frank W. Eaton by the scripee, by virtue of which he made the locations, could carry with it under the law, the power and au-

thority as well, to make the improvements required by law. There is evidence sufficient to raise suspicion of bad faith, between some of the parties herein, having an alleged interest in the result of this suit, but it in nowise affects any interest of the Government.

The law expressly prohibits assignments of S. H. B. S. No provision is made, in express terms, in the act authorizing the issue of said scrip, for the location of it by attorney, "upon any of the unsurveyed lands, not reserved by Government, upon which they (grantees of said scrip) have respectively made improvements," but a general power to so locate it, appears to be implied, and to have been uniformly acted upon by the department.

64 The Government is not called upon to adjudicate questions in cases, except where it is an interested party. The legality of these locations in issue in this case, and as in the case of Allen *et al. vs.* Merrill *et al.*, decided by the Commissioner Dec. 2, 1887, and reported in 14 Copp. L. C., 243, the evidence shows conclusively that the scripee never saw the land, or the improvements or had anything whatever to do with either.

The circular referred to requires that the Indian shall have a direct connection with the land and claim the same for his personal use. Following the ruling in the case above cited, I must reverse your decision and hold said locations for cancellation, subject to the right of appeal.

Advise the parties accordingly.

Respectfully,

T. J. ANDERSON,
Assistant Commissioner.

Filed in my office December 4th, 1895.

JOHN OWENS,
Clerk of District Court,
By W. A. KENNEDY, *Deputy.*

BISHOP IRON COMPANY, Plaintiff,
vs.
THOMAS W. HYDE ET AL., Defendants.

Demurrer.

65 Plaintiff demurs to that part of the amended answer and cross-petition of the defendant set forth in subdivision 2 of said amended answer and cross-petition containing new matter pleaded as a counter-claim, on the ground that the facts therein stated do not, upon their face, constitute a defense.

DRAPER, DAVIS & HOLLISTER,
Attorneys for Plaintiff.

Filed Dec. 17, 1895.

(Title same as above.)

Demurrer.

The defendants Fred F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph H. Sharp, John P. Johnson and N. J. Miller demur

to the counter-claim of the defendant, Thomas Hyde, and for cause of demurrer allege the following reasons:

1. The said alleged counter-claim does not state, set forth or allege any cause of counter-claim against the plaintiff or any cause of action against these defendants or against any one of them.

2. The said alleged counter-claim shows by its allegations that said defendant Hyde has no right or title to, and has no interest in, the land described in the complaint and claimed by him in
66 his alleged counter-claim, and therefore that he has no cause of action against these defendants, or any one of them therefor.

Wherefore, these defendants demand that they may be hence dismissed and that they may have judgment for their costs and disbursements against said defendant.

WHITE & McKEON,
Attorneys for Huntress, Brown, Smith, Johnson, Sharp, and Miller.

Filed July 1st, 1895.

(Title same as above.)

Order.

This cause came on to be heard on a demurrer of the plaintiff and the defendants Fred F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph Sharp, N. J. Miller, and John P. Johnson, to the amended answer and counter claim of the defendant Hyde, and was heard by the court on the 7th day of December, 1895, Messrs. Draper, Davis & Hollister appearing for the plaintiff, John Jenswold, Jr., Esq., appearing for the defendant Hyde, and Messrs. White & McKeon appearing for the other defendants above named, whereupon on mature deliberation it is considered by the court that the said demurrer should be sustained.

67 Thereupon it is ordered and adjudged that said demurrers be, and the same are hereby, sustained.

Dated at Duluth, Minn., this 10th day of December, A. D. 1895.

S. H. MOER,
District Judge.

(Filed December 10th, 1895.)

(Title same as above.)

Demurrer of Defendants Forman.

The defendants, Forman, hereby separately demur to the cross-petition in the above-entitled action, upon the ground-,

1st. That the court has no jurisdiction of the subject of the action.

2nd. That the cross-petition does not state facts sufficient to constitute a cause of action.

WILSON & VAN DERLIP,
Attorneys for Defendants Forman.

(Title same as above.)

Demurrer.

Defendant Frank R. Webber, appearing herein by his attorney, J. B. Richards, demurs to the answer of the defendant Thomas
68 W. Hyde on the grounds as follows, viz: That the same does not set forth any facts sufficient to constitute a defense to the cause of action set up in the complaint of the plaintiff, and asks that judgment may follow according to the prayer of the complaint, and that defendant Webber have judgment for his costs and disbursements against said defendant Hyde.

Dated July 10th, 1895.

J. B. RICHARDS,
Attorney for Defendant Webber, 301 *Burrows Bdg., Duluth; Res.*, 522 *W. 5th St.*

(Title same as above.)

Order Sustaining Demurrer.

This cause came on to be heard on the demurrers of the defendants Frank R. Webber, Frank W. Forman and Frank B. Forman, to the amended answer and counter-claim of the defendant Hyde at the special term of this court held on the 19th day of September, A. D. 1896, Jno. Jenswold, Jr. appearing for the defendant Hyde, and Messrs. Wilson & Van Derlip appearing for the defendants Frank W. Forman and Frank B. Forman, and J. B. Richards, Esq., appearing for Frank R. Webber; after argument by the respective attorneys and due consideration by the court, it is,

69 Ordered, that said several demurrers be and the same are hereby sustained.

Dated September 19th, A. D. 1896.

By the court:

C. L. BROWN,
District Judge, Acting.

Reply.

(Title same as above.)

The plaintiff, for reply to the amended answer of Thomas W. Hyde, denies each and every allegation in the first subdivision of said amended answer, constituting the first four folios of said answer, except such facts as are alleged in plaintiff's complaint.

Wherefore, plaintiff demands judgment as in its complaint.

DRAPER, DAVIS & HOLLISTER,
Attorneys for Plaintiff.

(Duly verified and filed Oct. 3, 1896.)

Findings of Facts, &c.

(Title same as above.)

The above-entitled cause having been brought on to be
70 heard upon pleadings and proofs, at the November, 1896, term of this court, Draper, Davis & Hollister appearing for the plaintiff, and John Jenswold appearing for the defendant, and the court, having duly considered the same, finds the following facts:

Findings of Fact.

1. That plaintiff was on the 27th day of December, 1894, and still is a corporation.

2. That plaintiff, prior to the commencement of this action acquired the legal title from the persons owning the same, of an undivided thirteen-twenty-fifths ($\frac{13}{25}$) of the northeast quarter (N. E. $\frac{1}{4}$) of the southwest quarter (S. W. $\frac{1}{4}$) of section thirty (30), in township sixty-three (63) north, range eleven (11) west of the 4th P. M. in Minnesota; and also acquired, prior to the commencement of this action, a lease from the persons holding the legal title thereto, of the remaining twelve-twenty-fifths ($\frac{12}{25}$) of said land for a period of thirty (30) years from the fourth day of March, 1889, in and by which lease plaintiff was granted the right to immediately have and possess said twelve-twenty-fifths ($\frac{12}{25}$) interest in said land.

3. That prior to the commencement of this action defendant was in possession of said lands, and possession thereof was demanded of him by plaintiff, which was refused.

4. That those who conveyed said thirteen-twenty-fifths ($\frac{13}{25}$) of said land to plaintiff and leased the remaining twelve-
71 twenty-fifths ($\frac{12}{25}$) thereof to plaintiff, acquired said lands by conveyances executed by the person or persons to whom said premises were patented by the United States of America.

5. That said defendant does not own or hold or claim to own or hold said premses by virtue of any patent of the United States or any other instrument of conveyance executed by any person or persons claiming by, through or under those having the legal title to said lands.

Conclusions of Law.

1. That plaintiff is the owner in fee of an undivided thirteen-twenty-fifths ($\frac{13}{25}$) of said lands, and lessee of the remaining twelve-twenty fifths ($\frac{12}{25}$) of said lands from the owners thereof.

2. That defendant is in the wrongful possession of said premises and has no title to or interest therein.

3. That plaintiff is entitled to the immediate possession of said lands.

4. That plaintiff is entitled to judgment for his costs and disbursements in this action.

Let judgment enter accordingly.

By the court:

J. D. ENSIGN, *Judge.*

Dated December 4th, 1896.

Filed Dec. 4, 1896.

72 *Case or Bill of Exceptions.*

(Title same as above.)

The above entitled cause coming on for trial before the Hon. J. D. Ensign, one of the judges of said court, a jury having been waived, on the 30th day of November, 1896, at a general term of said court held in and for said county, Messrs. Draper, Davis & Hollister appearing as attorneys for the plaintiff, and John Jenswold, Jr., as attorney for the defendant Thomas Hyde, it appearing that the mandate from the supreme court affirming the action of this court sustaining the demurrer to defendant's amended counterclaim is on file herein, whereupon the following evidence was given and proceeding had, to wit:

Plaintiff offered in evidence a patent from the United States to James H. Warren, dated December 26th, A. D. 1894, and recorded January 4th, A. D. 1895, in Book 99 of Deeds on page 390 of the deed records of St. Louis county, Minnesota, to which offer the defendant Hyde duly objected as incompetent, immaterial and irrelevant, and for the further reasons that the same was issued without authority and was void for the reasons and upon the grounds set forth in said defendant's counter-claim herein.

Said objection was overruled, to which ruling said defendant duly excepted.

73 Said patent is in due and legal form and purports to have been issued by the proper authority and to convey the land in controversy herein.

Plaintiff also offered in evidence duly executed and acknowledged deeds of conveyances from the said Warren and wife, and mesne conveyances and instruments which upon their face conveyed and vested the title which said Warren by said patent obtained, in the plaintiff herein as follows, to wit: As absolute owner in fee-simple, an undivided thirteen-twenty-fifths of said land, and as the sole and exclusive lessee to hold for the full term of thirty years from March 6th, A. D. 1889, an undivided thirteen-twenty-fifths of said land.

To each of these offers the defendant Hyde duly objected as incompetent, immaterial and irrelevant, which objections were each overruled and to which several rulings said defendant duly excepted.

Certificate.

The foregoing case or bill of exceptions having been examined by the undersigned, the judge who tried the said cause, and having

been found conformable to the truth, is hereby allowed and signed as the settled case or bill of exceptions, and a part of the record herein, and the same as settled contains all the proceedings had upon the trial of said cause, together with all objections, rulings, exceptions and admissions of the parties, the evidence offered and that given therein.

74 Dated this 19th day of December, A. D. 1896.

By the court:

J. D. ENSIGN,
District Judge.

(Filed Dec. 19, 1896.)

Notice.

To Messrs. Draper, Davis & Hollister, attorneys for the plaintiff herein:

Please take notice, that the foregoing is the proposed case or bill of exceptions which the defendant Hyde will present to the judge of said court, and ask to be signed, settled and allowed as the settled case or bill of exceptions herein.

Dated December 15th, A. D. 1896.

JNO. JENSWOLD, JR.,
Attorney for Defendant Hyde.

(Filed Dec. 17, 1896.)

Stipulation.

It is hereby stipulated and agreed that the foregoing shall be signed, settled and allowed as the settled case or bill of exceptions herein, and that the plaintiff's motion for a new trial herein be heard by the court at a special term thereof to be held on

75 December 19th, A. D. 1896, without notice as required by the statutes and rules of this court.

DRAPER, DAVIS & HOLLISTER,
Attorneys for Plaintiff.

JNO. JENSWOLD, JR.,
Attorney for Defendant Hyde.

(Filed Dec. 17, 1896.)

Motion for New Trial.

(Title same as above.)

Comes now the defendant Hyde in the above-entitled cause and moves the court for an order vacating and setting aside its findings decision and order herein, and that it grant a new trial for the following causes materially affecting his substantial rights, to wit:

1st. That said findings, report and decision is not justified by the evidence.

2nd. That the same is contrary to law.

3rd. Errors in law occurring at the trial and excepted to by the fendan I yde.

4th. The order of the court herein sustaining the demurrer to the defendant Hyde's amended and substituted counter-claim herein.

JNO. JENSWOLD &
JOHN BRENNAN,
Attorneys for Defendant Hyde, No. 306 Palladio Bldg., Duluth, Minn.

(Filed Dec. 17, 1896.)

76 *Order.*

(Title same as above.)

The motion of the defendant Hyde made herein for an order setting aside the findings and decision of the court and order for judgment herein and granting a new trial, having been fully argued by counsel for the respective parties, and the court being fully advised in the premises it is hereby,

Ordered, that the said motion be and the same is hereby denied.

J. D. ENSIGN,
District Judge.

(Dated Dec. 19, A. D. 1896.)

(Title same as above.)

The above-entitled cause having been brought on to be heard upon pleadings and proofs, at the November, 1896, term of this court, Draper, Davis & Hollister appearing for the plaintiff, and John Jenswold, Jr., appearing for the defendant Thomas W. Hyde, and the court having duly considered the same, finds the following facts:

Amended Findings of Fact.

1. That plaintiff was on the 27th day of December, 1894, and still is a corporation.

77 2. That plaintiff prior to the commencement of this action acquired the legal title in fee of an undivided thirteen-twenty-fifths ($\frac{13}{25}$) of the northeast quarter (N. E. $\frac{1}{4}$) of the southwest quarter (S. W. $\frac{1}{4}$) of section thirty (30) in township sixty-three (63) north, range eleven (11) west of the 4th P. M. in Minnesota, and is now seized thereof by mesne conveyances from the person to whom the said premises were patented by the United States; and also acquired, prior to the commencement of this action, a lease from the persons holding the legal title in fee thereto, as above stated, of the remaining twelve-twenty-fifths ($\frac{12}{25}$) of said land for a period of thirty (30) years from the fourth day of March, 1889, and by which lease plaintiff was granted and acquired the right to immediately have and possess said twelve-twenty-fifths ($\frac{12}{25}$) interest in said land during all of said thirty years; that defendant Thomas W. Hyde has no title to or interest in said lands or any part thereof.

3. That at and prior to the commencement of this action, defendant Thomas W. Hyde was and still is in the wrongful and unlawful

possession of said lands, without any color of title thereto or interest therein, and possession thereof was demanded of him by plaintiff, which was refused.

4. That those who conveyed said thirteen *twelve* twenty-fifths ($\frac{13}{25}$) of said land to plaintiff and leased the remaining twelve-twenty-fifths ($\frac{12}{25}$) thereof to plaintiff, acquired said lands by
78 conveyances executed by the person or persons to whom said premises were patented by the United States of America.

5. That said defendant Thomas W. Hyde does not own or hold or claim to own or hold said premises by virtue of any patent of the United States or any other instrument of conveyance executed by any person or persons claiming by, through or under those having the legal title to said lands.

Conclusions of Law.

That plaintiff is the owner in fee of an undivided thirteen-twenty-fifths ($\frac{13}{25}$) of said lands, and lessee of the remaining twelve-twenty-fifths ($\frac{12}{25}$) of said lands from the owners thereof.

2. That defendant is in the wrongful possession of said premises and has no title to or interest therein.

3. That plaintiff is entitled to the immediate possession of said lands.

4. That plaintiff is entitled to judgment for its costs and disbursements in this action.

Let judgment enter accordingly.

By the court:

J. D. ENSIGN, *Judge.*

Dated March 13, 1897.
(Filed March 13, 1897.)

79 (Title same as above.)

Judgment.

The above-entitled cause having been duly brought on to be heard and being regularly on the calendar of said court for trial at the November, 1896, general term of said court, Draper, Davis & Hollister appearing as attorneys for plaintiff, and John Jenswold, Jr., appearing as attorney for the defendant Thomas W. Hyde, and the court having heard the evidence, the arguments of counsel, and due consideration having been had, having made and filed findings of fact and conclusions of law and ordered judgment to be entered therein in favor of said plaintiff and against said defendants:

Now therefore, in accordance with and in pursuance of said order for judgment, it is ordered and decreed, that the plaintiff, Bishop Iron Company, is the owner in fee of an undivided thirteen-twenty-fifths ($\frac{13}{25}$) of those certain lands situated in said State of Minnesota, known and described as the northeast quarter (N. E. $\frac{1}{4}$) of the southwest quarter (S. W. $\frac{1}{4}$) of section thirty (30) in township sixty-three (63) north, range eleven (11) west of the fourth principal

meridian in Minnesota, and that it, said Bishop Iron Company, is the lessee of the remaining twelve-twenty-fifths ($\frac{12}{25}$) of said lands for a period of thirty (30) years from and after the 4th day of March, 1889.

80 It is further adjudged and decreed that said plaintiff, Bishop Iron Company, is entitled to the immediate possession of all of said lands and every part thereof, and that the defendant Thomas W. Hyde is in the wrongful possession of said premises, and has no title to and no interest in said lands, and no title to or interest in any part thereof.

It is further adjudged and decreed, that plaintiff do have and recover of the said defendant Thomas W. Hyde its costs and disbursements in this action, which have been heretofore taxed and allowed at the sum of thirty and $\frac{95}{100}$ dollars ($30.95), and that plaintiff is entitled to the process of this court to put it in possession of said lands and for the collection of said costs and disbursements.

Witness the Honorable J. D. Ensign, one of the judges of said court, and the seal of said court, at the city of Duluth in said county of St. Louis and State of Minnesota, this 17th day of March, in the year of our Lord one thousand eight hundred and ninety-seven.

[Seal of District Court.]

JOHN OWENS, *Clerk*,
By W. J. WEST, *Deputy*.

(Duly filed March 17, 1897.)

(Title same as above.)

Stipulation.

81 It is hereby stipulated by and between the defendants Thomas W. Hyde and Frank W. Forman and Frank B. Forman, by their respective attorneys, that notice of the entry of judgment in the above-entitled action is waived and that the clerk of said court may enter the same upon the records and files herein, the same being subject to all objections thereto except that of notice of such entry.

Dated March 17, 1897.

JOHN JENSWOLD, JR.,
Attorney for Thomas W. Hyde.
MESSRS. WILSON & VAN DERLIP,
Attorneys for Frank W. Forman and Frank B. Forman.

(Filed March 19, 1897.)

The above-entitled action having been duly brought on to be heard upon the demurrer of the defendants Frank W. Forman, Frank B. Forman, Fred F. Huntress, Samuel C. Brown, Frank R. Webber, Henry A. Smith, Joseph A. Sharp, John P. Johnson and N. J. Miller, to the cross-bill interposed and filed by the defendant

Hyde, Messrs. Wilson & Van Derlip and others appearing for said defendants Forman and others and Mr. John Jenswald, Jr., appearing for said defendant Hyde, and the court having heard the arguments of said counsel and having duly considered the same, and having thereafter duly made and filed its order sustaining said demurrer and no appeal from said order having been taken,
82 and the time for appealing therefrom having expired, upon motion of Messrs. Wilson & Van Derlip and others, attorneys for said defendants Forman and others, and in pursuance of the stipulation filed herein in behalf of said defendant Hyde—

It is ordered and decreed, that the defendant Thomas W. Hyde has no right, title, estate, interest or property in or to any of the lands described in the complaint in this action and in his said cross-bill, to wit: the N. E. ¼ of the S. W. ¼ section 30, in township 63, north of range 11 west in St. Louis county, Minnesota, as against the defendants Frank W. Forman, Frank B. Forman, Fred F. Huntress, Samuel C. Brown, Frank R. Webber, Henry A. Smith, Joseph A. Sharp, John P. Johnson and N. J. Miller, and that said Thomas W. Hyde is barred and estopped from having or claiming any right, title, interest, estate or property in or to any part of said described lands adverse to said defendants, Frank W. Forman, Frank B. Forman, Fred F. Huntress, Samuel C. Brown, Frank R. Webber, Henry A. Smith, Joseph A. Sharp, John P. Johnson and N. J. Miller.

Witness the Hon. J. D. Ensign, one of the judges of said court, and the seal of said court at Duluth, in St. Louis county, State of Minnesota, this 19th day of March, 1897.

[Seal of District Court.]

JOHN OWENS, *Clerk*,
By W. J. WEST, *Deputy*.

83 (Title same as above.)

Notice of Appeal.

To Messrs. Draper, Davis & Hollister, attorneys for the plaintiff, The Bishop Iron Company, and to Messrs. Wilson & Van Derlip, attorneys for the defendants Frank B. Forman and Frank W. Forman, and to Messrs. White & McKeon, attorneys for the defendants Fred F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph A. Sharp, John P. Johnson, and N. J. Miller, and to J. B. Richards, Esq., attorney for the defendant Frank R. Webber, and to John Owens, clerk of said district court:

Please take notice that the above-named defendant Thomas W. Hyde appeals to the supreme court of the State of Minnesota, from the judgment of the said district court entered herein, as of dates March 17th, 1897, and March 19th, 1897, in favor of the plaintiff and against the defendant Hyde and in favor of the defendants Frank B. Forman, Frank W. Forman, Fred F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph A. Sharp, John P. Johnson, N. J.

Miller and Frank R. Webber, and against the defendant Thomas W. Hyde, and from the whole thereof.

Dated this 21st day of August, A. D. 1897.

JOHN JENSWOLD, JR.,
Att'y for the Defendant Thomas W. Hyde,
No. 306 Palladio B'ld'g, Duluth, Minn.

84–177 (Duly served on clerk of district court and on all attorneys for all defendants Sept. 8, 1897, and filed Sept. 10th, 1897.)

178 *First Opinion.*

(Supreme Court of Minnesota, July 24, 1896.)

BISHOP IRON CO.
v.
WEBBER ET AL.

Public lands—Pre-emption—Disqualification of claimant—Stipulations—Effect.—A party claiming the right to pre-empt certain Government land filed an application to contest as invalid a prior entry, and the contest was being heard by the local land officers. He then voluntarily stipulated into the hearing certain evidence as to his qualifications and right to make a pre-emption, although that question had not been ordered to be inquired into at the contest; but the Commissioner of the General Land Office and the Secretary of the Interior passed upon the evidence, and held that the party was disqualified to pre-empt the land. Held, that by the stipulation he waived his right to object to a consideration of his qualifications and rights as a pre-emption claimant, and the irregular manner in which the officers of the Land Department proceeded in adjudicating as to such qualifications and rights, and, there being evidence to sustain a finding that he was disqualified and had not a pre-emptor's rights, such finding is conclusive upon him.

(Syllabus by the court.)

Appeal from district court, St. Louis county—S. H. Moer, judge.

Ejectment by the Bishop Iron Company against Frank R. Webber and others. Plaintiff's lessors were made parties defendant at the instance of defendant Thomas Hyde, and from an order vacating the order making them parties and sustaining demurrers to said defendants' answer said defendant appeals. Affirmed.

John Jenswold, Jr., and John Brennan, for appellant; Draper, Davis & Hollister, for respondent; White & McKeon, for defendant, respondents; Billson, Congdon & Dickinson, for defendants.

COLLINS, *J.:*

This was an action of ejectment, plaintiff corporation alleging that it was the owner of $\frac{13}{20}$ of the 40 acres in controversy and lessee

from the owners in fee of the remaining $\frac{2}{5}$, and therefore entitled to the sole and exclusive possession of the entire tract. The
179 answer admitted that defendant was in possession of the tract, and generally denied all other allegations of the complaint. It then set forth an equitable counter-claim at great length and with much detail, from which it appears that in 1894 a patent had been issued for said land to one Warren by the General Government, and that plaintiff's claim to be the owner of an undivided $\frac{3}{5}$ of the 40 was based upon a deed from Warren, while the plaintiff's rights as lessee were predicated upon conveyances, whereby the lessors had succeeded to Warren's title to the remaining $\frac{2}{5}$. It was alleged, with particularity as to the facts, that the patent to Warren was issued erroneously, unlawfully, and in defiance of defendant's right to have the patent issued to him. Judgment was demanded that the title to the land be decreed to be in defendant, and held by plaintiff and the other parties named in the answer in trust and for defendant's use and benefit. Subsequent to the service of the answer on the plaintiff, defendant, upon such answer and proof of service of a notice of motion thereof upon plaintiff's attorneys, obtained an order from the court presumably upon the provisions of Laws 1895, c. 29, sec. 1, which is an amendment of Gen. St. 1894, secs. 5178–5181, bringing into the action plaintiff's lessors as defendants and requiring them to answer defendant's counter-claim. Four of these parties so brought into the case appeared and moved the court for an order vacating and setting aside the order whereby they had been made defendants upon the ground that it had been improvidently issued. The motion prevailed, and defendant appeals from the order whereby the earlier order was set aside and vacated. That part of the answer which set forth the counter-claim was then amended, and the plaintiff filed a general demurrer thereto, while such of the parties brought into the case as had not participated in the motion just mentioned also demurred, practically on the
180 same ground. Both demurrers were sustained, and defendant appeals. These appeals were argued and submitted together.

The controversy over the land in dispute, which is a part of the famous section 30, township 63, range 11, in the Duluth land district, has been raging in the Land Department of the General Government for many years, and in the answer defendant has given the history of this contention with great minuteness. We shall not undertake to state all of the allegations, but only such portion as will serve to make out position clear and well understood.

Defendant Hyde claims to have settled on the land about the 20th of August, 1884, and to have resided upon it ever since. He was then a qualified pre-emptor under the laws of the United States, and the land was vacant, unoccupied, unsurveyed, and subject to pre-emption. Afterwards the land was surveyed and the plat duly filed in the local land office. July 20, 1885, defendant appeared and applied to file a declaratory statement for and upon this particular 40 acres and three other adjoining tracts—160 acres in all. He alleges that he was informed by the local land officers that his

application would be rejected unless limited to the 40, and that he then informed the officers that his house and other improvements were on this tract, and that he intended to claim it as his pre-emption, whether he was successful in a contest which he had instituted against the location of certain half-breed scrip upon the balance of the land covered by his declaratory statement or not. From the indorsement upon the statement itself made by the officers it appears that his application was rejected as to all of the 160 except this 40 for the reason that the date of settlement therein averred did not antedate the unadjusted location of Sioux half-breed
181 scrip No. 19 D, issued to one Moreau, filed for location June 16, 1883, said location having, in the opinion of the officers, withdrawn the land from settlement under the pre-emption act when filed. Defendant thereupon appealed from the decision of the local land officers to the Commissioner of the General Land Office, under the belief, as he alleges, that his application had been entirely rejected. What has become of this appeal does not appear from the answer, except as may be inferred from subsequent allegations. It was alleged that prior to the making of this application the defendant had filed an affidavit of contest against the location of this scrip No. 19 D, and about the same time one McDonald, claiming to be a qualified pre-emptor and to have superior rights as such to 160 acres in the same section, filed another affidavit of contest against the location of scrip No. 19 E on the 160 just mentioned, made by the same person (Moreau) at the same time scrip No. 19 D was located, the grounds of the contest being the same in each case. April 6, 1886, a hearing was had for the McDonald contest on an order of the Commissioner that both cases should then be heard and the validity of the scrip locations determined. Meantime the locations had been adjusted so that No. 19 D covered three 40's included in defendant's declaratory statement before referred to, and No. 19 E covered the 160 claimed by McDonald, and it was further alleged that October 15, 1885, one Sharp, claiming to be the attorney-in-fact of James H. Warren, a mixed blood, had been permitted to locate Chippewa scrip on the 40 here in dispute, no notice thereof having been given to defendant. He first learned of this location April 10, 1886, and immediately filed an affidavit for a contest, alleging his own prior occupation, residence, and improvements, his application to file the declaratory statement, its rejection, and his appeal. December 22, 1888, a hearing was ordered and
182 the order transmitted to the local land officers. What was done, if anything, in the way of a hearing on this order does not appear, but February 18, 1889, the Secretary of the Interior revoked the same. Defendant then moved to set aside the order of revocation. The only allegation in reference to what action has been taken on this motion is that the Commissioner of the General Land Office had wrongfully refused to act upon it. It is perhaps of no consequence, but we are of the opinion that it would be somewhat remarkable if the Commissioner should act upon a motion to set aside an order made by the Secretary, his superior officer.

A copy of the order of the Commissioner whereby a contest was

ordered on the location of scrip No. 19 E is made a part of the answer. From this it appears that what is known as the "McDonald contest" was ordered upon the charges made to the Commissioner by both McDonald and the defendant. It further appears from this answer that all parties to the contest appeared and submitted evidence. It is also alleged in the answer that at this hearing certain evidence, stated in detail, was admitted and received, and that it was irrelevant, incompetent, and immaterial. We need not repeat this evidence, and will simply say that it strongly tended to show the defendant's settlement on the land was not made in good faith for his own use and benefit, but, on the contrary, that he had entered into a contract with at least one other person by which the title he might acquire to the land embraced in his declaratory statement would inure, should he be successful in his contest over the location of scrip No. 19 D, to the benefit of such other person, and therefore that he was absolutely unable to make the oath prescribed in the pre-emption act (Rev. St. U. S., sec. 2262). While there was some equivocation in the testimony of the witnesses
183 on this point, we do not hesitate to say that it was sufficient to sustain a verdict of a jury that the defendant had entered into such a contract or to warrant a finding of a court or of the officers of the Land Department of the same import. Such a verdict or finding would not be disturbed by us on appeal from a trial court. At the conclusion of the taking of the testimony all of the parties to the other contest entered into a stipulation whereby it was agreed that the testimony theretofore taken should be considered in determining the validity of both locations of scrip No. 19 D and 19 E, thus stipulating into the contest over the location of scrip 19 D the testimony taken in the contest over scrip 19 E. There was testimony received at the hearing which tended to establish the allegation made by McDonald and the defendant that the scrip locations were illegal, and, while the local land officers held them valid, their decision was reversed August 4, 1888, by the Commissioner of the General Land Office, and he ordered that the scrip location be held for cancellation, subject to the contestee's right to appeal. In alleging this decision defendant avers that the Commissioner also rejected defendant's application to file on the lands. The contestee thereupon appealed to the Secretary of the Interior, and he affirmed the decision February 18, 1889; but, according to the averments of the answer, the Secretary also held that the lands were open to entry by the first legal applicant. The defendant subsequently obtained from the Secretary an order modifying the decision in so far as it determined that the preference right of entry of either McDonald or defendant was therein decided. There are other allegations in the answer to the effect that no charges were ever made or filed in the Land Department affecting the right of defendant to file on the land as a
184 pre-emptor, or his good faith as a pre-emptor, and that on these questions he has never been heard, because in none of these contests have such questions been in issue, and allegations respecting an application to contest the Warren entry made by one

Hartman; other applications to contest such entry by other parties, and an application by one Chandler to locate scrip on this 40, all of which were refused and rejected by the Commissioner, he holding that the location of the Warren scrip was legal and valid. Appeal being taken to the Secretary by all parties contesting, defendant included, the Secretary decided, May 31, 1892, "that this defendant could claim nothing by virtue of his pre-emptive claim" to the 40 in dispute, but ordered a hearing of the contest made by Hartman. Defendant then moved for a rehearing, making several assignments of error, and November 12, 1892, this motion was denied. When the hearing of the Hartman contest came on in the local land office defendant applied to be made a party thereto and his application was rejected. Again he appealed, and in August, 1893, the Commissioner decided that he had no standing in the case or right to contest the Warren entry. As might be expected, this decision was appealed to the Secretary, and July 20, 1894, the Commissioner's decision was affirmed, and it was ordered that the Warren entry be held for patenting. A patent based on this entry was then issued and delivered. We have therein stated the allegations found in that part of the answer denominated the counter-claim, from which it seems certain that this controversy has occupied the attention and commanded the time of the local land officers, the Commissioner of the General Land Office, and the Secretary of the Interior quite steadily for more than 10 years. If persistency always brought reward and was enough in itself to support a con-
185 clusion that defendant's claim to the land was well founded and meritorious, he would have been awarded it years ago.

We do not find it necessary to consider a number of the points made in the briefs, but shall rest our conclusion that the order sustaining the demurrers must be affirmed upon the proposition heretofore stated, that the testimony we have referred to, as detailed in the answer, was sufficient to justify a finding by the Commissioner and the Secretary that this defendant could not make the oath required of him as a preliminary condition to his right to enter Government land under the pre-emption act—a finding evidently made and on which all subsequent action seems to have been predicated. We are not required to express any opinion upon the merits of the claim made by defendant to this land, aside from those mentioned, and expressly decline so to do; nor are we to determine to precisely what extent it is the province of a court of equity to inquire into the facts of a case like this, notwithstanding the decisions of the Land Department. As before indicated, our decision will be rested upon the proposition stated in reference to the testimony taken at the hearing in respect to the location of scrip No. 19 E, and thence stipulated into the contest over the location of scrip No. 19 D. At this hearing testimony was taken and submitted, not only in reference to the legality of the scrip locations, but also the claims and rights of the pre-emption applicants, McDonald and defendant Hyde. This testimony was not objected to in any manner, so far as has been shown by the answer, as it should have been if the parties wished to avail themselves of a claim in those cases, or elsewhere,

that such testimony was irrelevant, incompetent, or immaterial. If
the contestants chose to voluntarily litigate the question as to
186 their rights or qualifications as pre-emption claimants at
those hearings, they are not now in position to say that the questions were not litigated because not strictly within the issues ordered to be heard, and that the testimony was of no effect. If, upon the other hand, the testimony in reference to contestants' rights and qualifications was properly in that case, and it may have been, in order to give the contestants any standing before the department, it was properly there for every purpose, and the contestants would be bound by it. So that it is immaterial whether such testimony was introduced at the hearing by consent—that is, the questions were voluntarily litigated—or legitimately, and as bearing upon a proper subject of inquiry. It is also to be borne in mind that when these hearings were had the defendant's right to file a declaratory statement and to enter land under the pre-emption act was before the Land Department upon appeal from a decision of the local land officers rejecting his filing. It is alleged that when deciding the scrip contests the Commissioner rejected defendant's application to file a declaratory statement, and, further, that in his decision of February 18, 1889, the Secretary held that the lands involved in the scrip-location contests were open to entry by the first legal applicant; and it is also alleged that in May, 1892, the Secretary held that the defendant could claim nothing by virtue of his pre-emption claim. The first of these decisions was in the matter of the contests wherein the damaging testimony was introduced, and upon the face of the answer must be regarded as a finding that defendant could not legally comply with the conditions of the pre-emption act; nor was it necessary whenever defendant asserted his claim to be entitled to pre-empt the entire 160 or any
part thereof to again take testimony, again consider it, and
187 again determine that which had once been passed on. It
was not error to dispose of defendant's pre-emption claim, as seems to have been done, whenever asserted after the scrip-location contest, by reference to another decision, and holding it invalid. This was the ruling of the Secretary November 12, 1892 (Hyde *v.* Warren, 15 Land Dec. Dep. Int., 415); to which ruling reference is made in the answer. In the Land Department the question was *res judicata* upon the same principle as would be applied in a court of justice if there had been a verdict against defendant followed by a judgment, an estoppel by verdict. The competency of the defendant to comply with the requirements of the pre-emption act—his qualification as a pre-emptor—was a question of fact peculiarly for the determination of the officers of the Land Department. It has repeatedly been held that the decision of these officers is conclusive on a question of fact in the absence of fraud. Vance *v.* Burbank, 101 U. S., 514, and cases cited. But if this had not been held, it is obvious that we should give to the evidence on which a finding is made by the department officers as much weight as we would give to evidence received upon the trial of an ordinary civil action in our own courts. We do not reverse a finding if the evi-

dence reasonably tended to support it, and it is wholly immaterial whether the fact determined relates to the qualifications of a claimant to enter land under the pre-emption act or to the settlement and improvements under which he claims the right to enter; but counsel for defendant urge that the stipulation through which the testimony we have referred to was stipulated into the contest over the location of scrip No. 19 D on part of the land described by defendant in his declaratory statement was that such testi-
mony should be considered in determining the validity of the
188 scrip locations, and nothing more. But, as before stated, it appears that these contests were initiated and prosecuted by McDonald and defendant jointly, and the testimony was in this case actually taken without objection, either as bearing upon an issue which the parties last named had volunteered to litigate or as properly being within the issues—always tried without pleadings in land contests, and in proceedings much more informal than in a court of justice—and thus competent and material in all respects. If the defendant desired to exclude this particular testimony from consideration he should have so stipulated, and evidently he did not do so. The evidence was in both cases without objection or reservation. No restrictions were placed upon it, and nothing to indicate that it was not to be considered and passed upon. He thus waived the irregularity, if there was any. The testimony was before the land officers for all legitimate purposes. They determined the question of fact presented, and there is no reason why we should disturb the finding. The order sustaining the demurrers must be affirmed. It therefore seems unnecessary for us to discuss the merits of the question presented by the other appeal, and the order appealed from must be affirmed. It is so ordered.

189 *Second Opinion.*

BISHOP IRON CO.
v.
HYDE ET AL.

(Supreme Court of Minnesota, April 22, 1898.)

Appeal—Review—Entry of judgment.—The decision on the former appeal (68 N. W., 95; 66 Minn., 24) adhered to. Where the judgment entered by the clerk is unauthorized by the verdict, findings, or order of the court, the remedy is by application to the trial court to correct or vacate a judgment, and, unless such application has been made, this court will not consider the question on appeal.

(Syllabus by the court.)

Appeal from district court, St. Louis county; J. D. Ensign, judge.

Action by the Bishop Iron Company against Thomas W. Hyde, Frank B. Forman, and others. From a judgment in favor of Frank B. Forman on the demurrer to the cross-bill of defendants Thomas W. Hyde and another, the latter appeals. Affirmed.

John Jenswold, Jr., and John Brennan for appellant; Draper, Davis & Hollister for respondent Bishop Iron Co.; White & McKeon and J. B. Richards for respondents Huntress *et al.*; Wilson & Van Derlip for respondents Frank B. Forman and others.

MITCHELL, *J.*:

Every question presented by the first 10 assignments of error is covered by the decision on the former appeal (66 Minn., 24; 68 N. W., 95). By the eleventh assignment of error it is sought to make the point that the judgment entered by the clerk in favor of the respondents other than the plaintiff was not the proper one to enter upon the order sustaining their demurrer to the defendants' cross-bill. The error complained of was not that of the court, but of the clerk, and the remedy is not by appeal from the judgment, but by application to the trial court to have the judgment corrected, and, unless the power of that court has been thus invoked,
190 this court will not consider the question on appeal from the judgment. Scott *v.* Railway Co., 42 Minn., 170; 43 N. W., 966. Judgment affirmed.

191 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1898.

BISHOP IRON COMPANY, Plaintiff, Respondent,
vs.
THOMAS W. HYDE, Appellant; FRANK B. FORMAN ET AL., Defendants; Fred F. Huntress, Samuel C. Brown, Henry A. Smith, Jos. H. Sharp, John P. Johnson, and N. J. Miller, Defendants, Respondents. } No. 56.

Pursuant to an order of court duly made and entered in this cause on the third day of May, A. D. 1898, it is here and hereby determined and adjudged that the judgment of the court below, herein appealed from, to wit, of the district court of the eleventh judicial district, sitting within and for the county of St. Louis, be, and the same hereby is, in all things affirmed.

And it is further determined and adjudged that the plaintiff, respondent, above named, do have and recover of said Thomas W. Hyde, appellant herein, the sum and amount of forty-six dollars ($46.00), costs and disbursements in this cause in this court, and that said respondent have execution for the enforcement thereof.

Dated and signed this 3rd day of May, 1898.

By the court:

[Seal of the Supreme Court, State of Minnesota.]

Attest: D. F. REESE, *Clerk.*

Statement for Judgment.

Costs allowed by statute	$25.00
Clerk's fees for making return	
Printer's fees	13.00
Clerk's fees, supreme court	7.50
Filing mandate	
Affidavits and acknowledgments	
Postage	
Copying returns for printer	
	$46.00

STATE OF MINNESOTA, } ss:
Supreme Court, }

I, D. F. Reese, clerk of said supreme court, do hereby certify that the foregoing is a full and true copy of the entry of judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom.

Witness my hand and the seal of said supreme court, at the capitol, in the city of St. Paul, this third day of May, A. D. 1898.

D. F. REESE, *Clerk.*

[Endorsed:] 10959. State of Minnesota, supreme court. Transcript of judgment. Filed May 3rd, A. D. 1898. D. F. Reese, clerk. —— ——, attorney for —— ——. Page No. 465, "V" Book.

192 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1898.

BISHOP IRON COMPANY, Plaintiff, Respondent,
vs.
THOMAS W. HYDE, Appellant; FRANK B. FORMAN ET AL., Defendants; Fred F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph H. Sharp, John P. Johnson, N. J. Miller, Defendants, Respondents. } No. 56.

Pursuant to an order of court duly made and entered in this cause on the third day of May, A. D. 1898, it is here and hereby determined and adjudged that the judgment of the court below, herein appealed from, to wit, of the district court of the eleventh judicial district, sitting within and for the county of St. Louis, be, and the same hereby is, in all things affirmed.

And it is further determined and adjudged that the defendants, respondents, above named, do have and recover of said Thomas W. Hyde, appellant herein, the sum and amount of thirty-seven and $\frac{65}{100}$ dollars ($37.65), costs and disbursements in this cause in this court, and that said respondents have execution for the enforcement thereof.

Dated and signed this 3rd day of May, 1898.

By the court:

[Seal of the Supreme Court, State of Minnesota.]

Attest: D. F. REESE, *Clerk.*

Statement for Judgment.

Costs allowed by statute	$25.00
Clerk's fees for making return	4.25
Printer's fees	7.50
Clerk's fees, supreme court	.50
Filing mandate	.25
Affidavits and acknowledgments	.15
Postage	
Copying returns for printer	
	$37.65

STATE OF MINNESOTA, } ss:
Supreme Court, }

I, D. F. Reese, clerk of said supreme court, do hereby certify that the foregoing is a full and true copy of the entry of judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within

copy with said original, and that the same is a correct transcript therefrom.

Witness my hand and the seal of said supreme court, at the capitol, in the city of St. Paul, this 3rd day of May, A. D. 1898.

D. F. REESE, *Clerk.*

[Endorsed:] 10959. State of Minnesota, supreme court. Transcript of judgment.

Endorsed: Filed May 3rd, A. D. 1898. D. F. Reese, clerk. —— ——, attorney for —— ——. Page No. 466, " V " Book.

193 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1898.

BISHOP IRON COMPANY, Respondent,
vs.
THOMAS W. HYDE, Appellant; Frank B. Forman *et al.*, Def'ts, Respondents.

No. 56. Appeal from District Court, Eleventh Judicial District, County of St. Louis.

This cause having been duly argued and submitted at the general April term of this court, A. D. 1898, upon the return to the appeal herein:

Now, after full and mature deliberation had thereon, it is here and hereby ordered that the judgment of the court below, herein appealed from, be, and the same hereby is, in all things affirmed, and that the respondents above named have judgment accordingly.

Entered May 3, A. D. 1898.

By the court:

[Seal of the Supreme Court, State of Minnesota.]

Attest: D. F. REESE, *Clerk.*

I hereby certify that the foregoing is a full and true copy of the original order for judgment entered in the above-entitled cause.

Attest: D. F. REESE, *Clerk.*

[Endorsed:] No. 10959. State of Minnesota, supreme court. Copy of order for judgment.

Endorsed: Filed May 3, A. D. 1898. D. F. Reese, clerk. Entered on page 129, M.

194 STATE OF MINNESOTA:

Supreme Court, General April Term, A. D. 1898.

MONDAY MORNING, 9.30 O'CLOCK, *April* 18, *A. D.* 1898.

Court convened pursuant to adjournment, all the justices being present.

BISHOP IRON COMPANY, Respondent,
vs.
THOMAS W. HYDE, Appellant; FRANK B. FOREMAN *et al.*, Respondents.
} Cal. No., 56: Reg. No., 10959.

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon the same was submitted to the court for decision upon paper book and briefs of counsel and taken under advisement.

A true record.

[Seal of the Supreme Court, State of Minnesota.]

Attest: D. F. REESE, *Clerk.*

The foregoing is a full and true copy of the minutes of argument in the above-entitled cause.

Attest: D. F. REESE, *Clerk.*

[Endorsed:] 10959. State of Minnesota, supreme court. Copy of minutes of argument.

Endorsed: Filed May 3, A. D. 1898. D. F. Reese, clerk.

195 [Endorsed:] No. 10959. State of Minnesota, supreme court. Bishop Iron Co., respondent, against Thomas Hyde, appellant; Frank B. Forman and Fred B. Huntress *et al.*, def't-, resp't-. Judgment-roll.

Endorsed: Filed May 3rd, 1898. D. F. Reese, clerk.

196 UNITED STATES OF AMERICA,
State of Minnesota, County of Ramsey, } *ss:*

In pursuance of the command of the writ of error within, I, D. F. Reese, clerk of the supreme court of the State of Minnesota, herewith transmit a true copy of the record, petition, assignment of errors, bond, order allowing writ of error, first and second opinion, judgment, and all proceedings in the case of Bishop Iron Company, defendant in error, *vs.* Thomas W. Hyde, plaintiff in error, and Fred F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph H. Sharp, John P. Johnson, N. J. Miller, Frank R. Webber, Frank W. Forman, and Frank B. Forman, defendants in error, lately pending in the supreme court of the State of Minnesota, under my hand and the seal of said court.

Witness my official signature and the seal of said supreme court, at the city of St. Paul, in the State of Minnesota, this twentieth day of August, in the year of our Lord one thousand eight hundred and ninety-eight.

[Seal of the Supreme Court, State of Minnesota.]

D. F. REESE,
Clerk of the Supreme Court of the State of Minnesota.

197 UNITED STATES OF AMERICA:

In Supreme Court.

BISHOP IRON COMPANY, Defendant in Error,
vs.
THOMAS W. HYDE, Plaintiff in Error; FRED F. HUNTRESS, SAMUEL C. BROWN, HENRY A. SMITH, JOSEPH H. SHARP, JOHN P. JOHNSON, N. J. MILLER, FRANK R. WEBBER, FRANK W. FORMAN, and FRANK B. FORMAN, Defendants in Error.

Statement of Errors on Which the Plaintiff in Error Intends to Rely and of the Parts of the Record Which He Thinks Necessary for the Consideration Thereof.

You will please take notice that hereto annexed and herewith served upon you is a copy and statement of the assignment of errors on which the plaintiff in error intends to rely in the above-entitled action in the Supreme Court of the United States, and that the following is a statement of the parts of the record which the plaintiff in error thinks necessary for the consideration thereof:

1. Complaint of the Bishop Iron Company.
2. Motion for order bringing in additional parties defendant.
3. Order bringing in additional parties defendants, dated June 17, 1895.
4. Amended answer and cross-petition.
5. Demurrer of the Bishop Iron Company.
6. Demurrer of Fred F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph H. Sharp, John P. Johnson, and N. J. Miller.
7. Order sustaining demurrer of the Bishop Iron Company, Fred F. Huntress, Samuel C. Brown, Henry A. Smith, Jo-
198 seph Sharp, N. J. Miller, and John P. Johnson.
8. Demurrer of defendants Forman.
9. Demurrer of Frank R. Webber.
10. Order sustaining demurrer of Frank R. Webber, Frank W. Forman, and Frank B. Forman.
11. Reply of the Bishop Iron Company.
12. Findings of fact and conclusions of law of the trial court.
13. Case or bill of exceptions.
14. Notice of settling bill of exceptions.
15. Stipulation that bill of exceptions be settled and motion *of* new trial heard, December 19th, 1896.
16. Motion for new trial.
17. Order denying motion for new trial.
18. Amended findings of fact and conclusions of law.
19. Judgment in favor of the Bishop Iron Company.
20. Stipulation as to entry of judgment.
21. Judgment in favor of Frank W. Forman, Frank B. Forman, Fred F. Huntress, Samuel C. Brown, Frank R. Webber, Henry A. Smith, Joseph A. Sharp, John P. Johnson, and N. J. Miller.
22. First opinion of the supreme court of the State of Minnesota.

23. Second opinion of the supreme court of the State of Minnesota.

24. Order for judgment made by the supreme court of the State of Minnesota, dated May 3, 1898.

25. Judgment in favor of the Bishop Iron Company, dated May 3, 1898.

26. Judgment in favor of Frank B. Forman, Frank W. Forman, Fred F. Huntress, Samuel C. Brown, Frank R. Webber,
199 Henry A. Smith, Joseph H. Sharp, John P. Johnson, and N. J. Miller.

C. L. CATLIN,
Attorney for Plaintiff in Error, Superior, Wisconsin.

JOHN JENSWOLD, JR., &
JOHN BRENNAN, *Of Counsel.*

To Draper, Davis & Hollister, attorneys for The Bishop Iron Company; White & McKeon, attorneys for Fed F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph H. Sharp, John P. Johnson, and N. J. Miller; J. B. Richardson, attorney for Frank R. Webber; Wilson & Vanderlip, attorneys for Frank W. Forman and Frank B. Forman.

200 UNITED STATES OF AMERICA, }
State of Minnesota. }

In Supreme Court.

BISHOP IRON COMPANY, Defendant in Error, }
vs.
THOMAS W. HYDE, Plaintiff in Error; Fred F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph H. Sharp, John P. Johnson, N. J. Miller, Frank R. Webber, Frank W. Forman, and Frank B. Forman, Defendants in Error. } Assignment of Errors.

I.

Thomas W. Hyde, the plaintiff in error in this action, in connec, tion with his petition for a writ of error makes the following assignment of errors, which he avers occurred on the trial of the cause-to wit:

1. The court erred in ordering and entering judgment in favor of The Bishop Iron Company, one of the defendants in error herein, and against the said Hyde, in this:

The facts set forth in said amended answer and counter-claim and admitted to be true by the reply of the said Bishop Iron Company show that the said Thomas W. Hyde, by his settlement, improvements, and residence upon the lands in controversy and his cultivation of the same, and his application to file thereon, and the filing of said application, and his contest of the Warren scrip selection and location, and his motion to cancel the same, and the prosecu-

tion of his rights to said lands before the Department of the Interior, as in said amended answer and counter-claim specifically set forth, acquired a right to be preferred in the acquisition of said lands from the United States and by virtue thereof became, was,
201 and now is the equitable owner thereof, and that but for the erroneous, illegal, mistaken, and unwarranted rulings and decisions of the honorable Secretaries of the Interior and the honorable Commissioner of the Land Office the patent to said lands would, prior to the issuing of the same to the said Warren, as of right it should, have issued to the plaintiff in error, and that judgment should have been entered in his favor.

2. The court erred in finding that the Bishop Iron Company was the owner in fee of any part of the premises in controversy for the reason that the facts set forth in the amended answer and counter-claim of the said Hyde and admitted to be true by the reply thereto show that he, the said Hyde, is the equitable owner of said premises, and that the said Bishop Iron Company holds nothing but the naked legal title to $\frac{13}{16}$ thereof in trust for him.

3. The court erred in finding that the Bishop Iron Company was the lessee of $\frac{12}{16}$ of said lands from the owners thereof, for the facts set forth in the amended answer and counter-claim of the said Hyde and admitted to be true by said reply show that he, the said Hyde, was and is the equitable owner of said lands, and that the lessors of the Bishop Iron Company held nothing but the naked legal title to $\frac{12}{16}$ of said land, subject to the rights of the said Hyde thereto.

4. The court erred in finding that the said Hyde was in the wrongful possession of said premises and has no title to or interest therein, for it appears from the facts set fourth in the amended answer and counter-claim of the said Hyde and admitted to be true by the reply thereto that he, the said Hyde, is the equitable owner of said lands, and as such has been ever since 1884 and now is in the actual, open, exclusive, and rightful possession thereof.

5. The court erred in sustaining the demurrer of Fred F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph H. Sharp,
202 N. J. Miller, and John P. Johnson, part of the defendants in error herein, to the amended answer and counter-claim of the said Thomas W. Hyde in this: The facts set forth in said amended answer and counter claim and which are admitted to be true by said demurrer show that the said Hyde is the equitable owner of said lands, and that any right, title, or interest therein which each or all of said defendants may have or hold jointly or separately they each and all have and hold in trust for said Hyde.

6. The court erred in sustaining the demurrer of Frank W. Forman and Frank B. Forman, two of the defendants in error herein, to the amended answer and counter-claim of the said Hyde, for the reason that the facts set forth in said amended answer and counter-claim and admitted to be true by said demurrer show that the said Hyde is the equitable owner of the lands in controversy, and that any right, title, or interest therein which said defendants in error or either of them have or hold they have and hold in trust for said Hyde.

7. The court erred in sustaining the demurrer of Frank R. Webber, one of the defendants in error herein, to the amended answer and counter-claim of the said Hyde, it appearing from the facts set forth in said amended answer and counter-claim, which are admitted to be true by said demurrer, that the said Hyde is the equitable owner of said land-, and that any right, title, or interest which the said defendant in error has or holds in or to said lands he holds in trust for the said Hyde.

8. The court erred in ordering and entering judgment in favor of Fred F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph H. Sharp, N. J. Miller, John P. Johnson, Frank R. Webber, Frank W. Forman, and Frank B. Forman, defendants in error herein, on the amended answer and counter claim of the said Hyde and the demurrers of the said defendants in error thereto "barring and
203 estopping him, the said Hyde, from having or claiming any right, title, or interest, estate, or property in or to any part of the said described lands adverse to said defendants" in error, in this: The facts set forth in said amended answer and counter claim, all of which are admitted to be true by said demurrers, show that the said Hyde was and is the equitable owner of said lands.

9. The court erred in denying the motion of the said Hyde to set aside and vacate the court's findings, decision, and order for judgment herein and for a new trial, in this, (*a*) that the facts set forth in the amended answer and counter claim of the said Hyde, which are admitted to be true by the reply of The Bishop Iron Company and the demurrers of the other defendants in error herein, show that the said Hyde is the equitable owner of the said lands, and whatever right, title, or interest which the defendants in error have or hold in and to said lands they and each of them hold the same in trust for the said Hyde; (*b*) that said findings, decision, and order are contrary to the facts, as admitted by the pleadings herein; (*c*) that said findings, decision, and order are contrary to law; (*d*) that the court erred in sustaining the said demurrers to the amended answer and counter-claim of the said Hyde.

II.

The plaintiff in error further says that in the record and proceedings in the above-entitled action there is manifest error, in this, to wit:

1. It was error for the court to hold that the Secretary of the Interior had a right to consider the testimony in reference to the contract of Hyde and McDonald with their attorney, taken in the case of McDonald *vs.* Eaton *et al.*, for the reason that the Secretary
in considering the same acted in violation and in disregard
204 of law and the usual and regular rules of practice of the department, and there was no such issue in said case.

2. It was error for the court not to consider the fact that the Secretary of the Interior made a mistake in reference to the testimony of the said Hyde given in the case of McDonald *vs.* Eaton *et al.*

3. It was error for the court to hold that the Secretary of the Interior could properly find that an illegal contract had been made

in reference to said lands, for the reason that said testimony, properly read, did not and does not show that he, said Hyde, ever made an illegal contract in reference thereto.

4. It was error for the court to hold that the Secretary of the Interior could consider and properly did consider the testimony in reference to said contract taken upon the hearing of the said case of McDonald *vs.* Eaton *et al.* in considering the said case of Hyde *vs.* Eaton *et al.*, for the reason that said testimony was not received in the Hyde case; the only testimony in the McDonald case which was stipulated into the Hyde case was that bearing upon the legality of the location of the Sioux half-breed scrip No. 19 D, which was the only issue in said case.

5. It was error for the court to hold that the Commissioner of the General Land Office properly dismissed the said Hyde contest against the said Warren script selection or location, for the reason that said Commissioner had no power or authority to dismiss the said contest without notice to the said Hyde, and the decision of the Secretary upon which he based his action was erroneous, unlawful, and unwarranted, and made in another case in which the question was not at issue, and to which the said Hyde was not a party, on incompetent, irrelevant, and mistaken testimony.

205 6. It was error for the court to hold that the "McDonald contest was ordered upon charges made to the Commissioner by both McDonald and the defendant" (the said Hyde), because such is not the fact, as alleged in the answer of the said Hyde.

7. It was error for the court to hold that in the said McDonald contest and the contest of the said Hyde against the said scrip locations they voluntarily litigated the question as to their respective pre-emption rights, for the reason that said holding was contrary to the fact, as alleged in said demurrer.

8. It was error for the court to hold that when the decision of the Secretary was made in the said contests against the Sioux half-breed scrip locations the rights of the said McDonald and of the said Hyde as pre-emptors were before him, for the reason that it is alleged in the said answer of said Hyde that said McDonald at said time had exhausted his pre-emption right, and the application of the said Hyde to file his declaratory statement on lots five and six and the S. E. ¼ of the N. W. ¼ of the said section 30 had been rejected by the Commissioner of the General Land Office on the ground that it did not antedate said Sioux half-breed scrip location No. 19 D, and no appeal had been taken therefrom, and for the further reason that the said Secretary did not decide that the rights of the said McDonald and of the said Hyde as pre-emptors were before him, but that he by virtue of his supervisory power could on incompetent, irrelevant, and immaterial testimony taken in another case before him act in a case which was not before him, which ruling was erroneous and unlawful.

9. It was error for the court to hold that the respective contests of the said McDonald and of the said Hyde "were initiated and prosecuted by the said McDonald and the defendant (the said Hyde)

jointly," for the reason that it is alleged in the answer that they were initiated and prosecuted separately.

206 10. It was error for the court to hold that the said testimony in reference to the said *contract* was in both cases the respective contests of the said McDonald and of the said Hyde against the said Sioux half-breed scrip locations without objection or reservation.

Wherefore the plaintiff in error prays that the judgment of the said State court be reversed, and that he have judgment decreeing him to be the equitable owner of said lands, and requiring the defendants in error to convey the same unto him, and for such other and further relief as may be just, and for costs.

JOHN JENSWOLD, JR., AND
JOHN BRENNAN,
Attorneys for Plaintiff in Error.
CHARLES L. CATLIN,
Attorney for Plaintiff in Error.

207 [Endorsed:] United States of America. In Supreme Court. Bishop Iron Co. *vs.* Thomas W. Hyde. Statement of errors on which the plaintiff in error intends to rely and of the record which he thinks necessary for the consideration thereof.

Service of the within statement admitted this — day of September, 1898.

——— ———,
Attorneys for Frank W. Forman and Frank B. Forman.

Service of the within statement admitted this 17th day of September, 1898.

DAVIS, HOLLISTER & HICKS,
Att'ys for Bishop Iron Co. Only.
WHITE & McKEON,
Attorneys for Fred F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph H. Sharp, John P. Johnson, & N. J. Miller.
J. B. RICHARDS,
Attorney for Frank R. Webber.

STATE OF MINNESOTA, } ss:
County of Hennepin, }

George E. La Clair, being duly sworn, deposes and says that on the 16th day of September, A. D. 1898, at the city of Minneapolis, county of Hennepin and State of Minnesota, he served the within statement of errors upon Wilson & Van Derlip, attorneys for Frank W. Forman & Frank B. Forman, defendants in error in the within-entitled action, by handing to and leaving with John R. Van Derlip, one of said attorneys, a true and correct copy of said statement of errors.

GEORGE E. LA CLAIR.

Subscribed and sworn to before me this 16th day of September, 1898.

[Notarial Seal, Hennepin Co., Minn.]

F. D. TOURBEE,
Notary Public, Hennepin County, Minnesota.

208 [Endorsed:] Case No. 16,973. Supreme Court U. S., October term, 1898. Term No., 388. Thomas W. Hyde, pl'ff in error, *vs.* Bishop Iron Co. *et al.* Designation by counsel for pl'ff in error of parts of record to be printed and assignment of errors, with proof of service. Office Supreme Court U. S. Filed Oct. 1, 1898. James H. McKenney, clerk.

[Endorsed:] United States of America. In Supreme Court. Bishop Iron Company, defendant in error; Thomas W. Hyde, plaintiff in error; Fred F. Huntress and others, defendants in error. Return to writ of error by clerk of State court.

Endorsed on cover: Case No. 16,973. Minnesota supreme court. Term No., 126. Thomas W. Hyde, plaintiff in error, *vs.* Bishop Iron Company *et al.* Filed September 3d, 1898.